IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1199

FOREST LAWN MEMORIAL GARDENS, INC.,
and
MT. OLIVET CEMETERY CO.,
Petitioners,

versus

MR. & MRS. GEORGE E. AYRES,
MR. & MRS. RAYMOND C. BROWN,
MR. & MRS. WILLIE G. HITT, JR.,
MR. & MRS. JOSEPH E. JOHNSON,
MR. & MRS. ALVIS C. LESLIE,
MR. & MRS. JAMES A. RUSSELL, and
CHARLES D. ALLISON and wife IRENE ALLISON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION

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Petitioners, Forest Lawn Memorial Gardens, Inc. and Mt. Olivet Cemetery Co., whose separate cases were consoli-

dated by order of the Tennessee Court of Appeals, respectfully pray the writ of certiorari issue to review the judgment of the Tennessee Court of Appeals, Middle Section.

OPINIONS BELOW

None of the opinions delivered in the Courts below have been reported, officially or unofficially. The opinions of the appellate courts below and, with the exception of duplications,[1] the opinions and orders constituting opinions of the court of first resort are: The Order of the Chancery Court of Davidson County, Tennessee sustaining the action as a class action (*infra*, A-1—A-3), the Order of the said Chancery Court declaring the contracts involved in the litigation to be invalid, granting a discretionary interlocutory appeal to the Supreme Court of Tennessee as to such judgment of illegality, and ordering certain issues referred to the Master (*infra*, A-4—A-6); the affirming opinion of the Supreme Court of Tennessee upon such interlocutory appeal (*infra*, A-8—A-10); Judgment (*infra*, A-11—A-18); Forest Lawn (*infra*, A-19—A-24) and Mt. Olivet (*infra*, A-25—A-30) Chancery Court orders overruling motions for rehearing and granting an appeal to the Tennessee Court of Appeals; opinion of the Tennessee Court of Appeals (*infra*, A-31—A-62); opinion of the Tennessee Court of

[1] Where there are any material differences in Chancery Court orders, the substantially duplicate orders in both cases are printed in the appendix; the principal difference in the Chancery Court records in the two cases is that only Forest Lawn involved an interlocutory appeal, but such difference is rendered immaterial by State law adjudication that the interlocutory appeal order is the law of the case in Mt. Olivet as well.

Appeals denying petition for rehearing (*infra*, A-63—A-66)[2]; order of the Supreme Court of Tennessee denying certiorari (*infra*, A-67); and order of the Supreme Court of Tennessee denying petition for rehearing (*infra*, A-68). Additionally, it is appropriate to mention a prior decision of the Supreme Court of Tennessee because its rendition was alleged as a fact in the Chancery Court complaint in each of these cases and its validity was drawn into question in the interlocutory appeal, *Garrett v. Forest Lawn Memorial Gardens, Inc.*, 505 S.W.2d 705 (Tenn., 1974)[3] (*infra*, A-69—A-81).

JURISDICTION

The judgment of the Tennessee Court of Appeals sought to be reviewed was entered on February 24, 1978, and reaffirmed by order denying a rehearing on April 18, 1978; the orders of the Supreme Court of Tennessee denying writ of certiorari and denying a rehearing of its prior denial of certiorari were entered respectively on September 18, 1978 and November 6, 1978. This Petition for Certiorari is timely filed within 90 days after denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The circumstances of the case within which the federal constitutional questions were raised in all courts below, are that Tennessee by statute and judicial construction had

[2] Additionally, and not material to this petition, the Court of Appeals denied a petition by respondents for clarification of its opinion or rehearing on a point of State statutory construction.

[3] Publication of official State reports was discontinued prior to this decision.

long held to be illegal mortician and cemetery contracts to furnish pre-paid burial services or funeral merchandise upon death, resulting in the customers' absolute right to refund; but both statute and judicial decision also secured to the customer the right to compel performance instead of demanding refund. Such illegality was re-confirmed by the Supreme Court of Tennessee in *Garrett* (*supra*, p. 2). Alleging *Garrett* as the basis of their right, these civil class actions (paralleling in each case the types authorized by Rule 23(b)(1) and (2), F.R.C.P.) were filed, asserting illegality of a large number of such contracts sold by each of these Petitioners, attaching copies of the contracts and alleging that they were rendered illegal by *Garrett*, being substantially identical to the contracts involved therein. After denial of all illegality, an order in the nature of partial judgment on the pleadings was entered declaring the contracts illegal and an interlocutory appeal was taken to contest the validity of *Garrett*. After remand, judgment was entered upon a motion for judgment without there having been an evidentiary trial and without the Court having before it any evidence other than stipulations incorporated in the orders themselves. In all post-judgment proceedings, it was conceded that each contract-holder had an absolute right to demand and receive refund either of the entire contractual consideration or substantial portions thereof if the illegal and legal portions of the contract were severable.[4] Post-judgment evidence was presented to the Chancellor proving that the right to demand enforcement was in all cases of substantially greater financial value than the right to demand refund and that some contract-holders had compelling personal reasons to choose enforcement rather than refund. The class action notices did not inform the class plaintiffs that they had an alternative right to compel performance which would be forfeited by refund.[5]

[4] The claim of severability and legality of portions of the contract selling cemetery lots and non-funereal merchandise (memorials) would have required evidence if a valid claim, but the State courts rejected such claim and no federal constitutional infirmity was asserted as to such rejection.

The following questions are presented for review:

Question No. 1: Whether a State class action adjudication under procedural rules patterned upon the Federal Rules of Civil Procedure, forfeiting valuable contract rights which were legally enforceable and ordering refunds to be subsequently distributed by the Court to the class plaintiffs, where there were named no representative class defendants opposed to contract cancellation and where class members were given no notice of the existence and probable forfeiture of their enforcement rights is rendered constitutionally invalid—

(a) as a taking of petitioners' property by adjudication without personal jurisdiction to adjudicate under minimal due process jurisdictional requirements; or

(b) a taking of the property of absent class plaintiffs without due process of law.

[5] The Chancery Court ordered the total amounts paid by all class members who had not excluded themselves to be paid to the Clerk of the Court, with interest and to be disbursed by the Clerk to class members and respondents' attorney. Though Petitioners assigned no error in failure of the Chancellor to declare the class-plaintiffs' rights forfeited upon payment of the refund into Court, the Court of Appeals modified the judgment to adjudge the contracts invalidated upon such refund and to require that the Clerk's refund checks should display notice of the termination of all contract rights (infra, A-56, A-61—A-62). Petitioners' actual contention was that the Court had no authority to achieve the forfeiture of rights which would accompany nullification and refund.

contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

Question No. 2: Does a State class action judgment directing petitioners to pay into court class plaintiffs' contract consideration and forfeiting more valuable contractual rights of class plaintiffs violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as to a minority of nine class members.

(a) who did not receive official court notices of the pendency of such class action in their behalf directed to them, but

(b) who apparently did receive envelopes addressed to them by the party sued in their behalf which contained form letters of content not appearing of record from such opponent and from the attorney then defending on behalf of such opponent, with a suggested form for requesting exclusion from the class, but without containing a copy of the Court's official notice communicated to other class members?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Material portions, Section 1, Fourteenth Amendment to the Constitution of the United States:

> ". . . . No State shall . . . . deprive any person of life, liberty, or property, without Due Process of law; . . . ."

2. Statutory provisions, printed below as Appendix B in accordance with Rule 23—1(d) are Rule 23, Tennessee Rules of Civil Procedure, and Sections 56-1101, 56-3205, 56-3208 (concerning illegality of the contracts in question),

56-3202 (concerning enforceability despite illegality), and 27-305 (concerning discretionary interlocutory appeals), Tennessee Code Annotated, as well as the jurisdictional statute, 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Although there was neither any evidentiary hearing nor motion for summary judgment supported by affidavits in this case, and although, as construed by the State's highest court, a court may not enter summary judgment in favor of a party unless that party has made a motion for summary judgment,[6] final judgment was rendered against these Petitioners. The record reveals how this occurred by virtue of the fact that the learned Chancellor, in ruling upon Petitioners' motion for rehearing upon their insistence of a right to evidentiary trial, took and enunciated judicial notice of the procedures that had been followed. Under Tennessee decisional law,[7] this is a proper mode for the record to establish such events otherwise not of record.

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[6] **Williamson County Broadcasting Co. vs. Williamson County Board of Education**, 549 S. W. 2d 371 (Tenn., 1977).

[7] By order of record, a judge may make matters of his personal recollection in a matter over which he presided a part of the record in the cause whether such events took place in the same case or a case which in substance is being reviewed in the subsequent case in which judicial notice is enunciated, such as **habeas corpus** following a criminal conviction. **State v. Heer**, 220 Tenn. 36 (1966); **Davis v. Robertson**, 165 Tenn. 609 (1933); **State ex rel. Wilkerson v. Bomar**, 213 Tenn. 499 (1964); **Carmack v. Fidelity-Bankers Trust Co.**, 180 Tenn. 571 (1944). The learned Court of Appeals recognized, by its statement that lack of evidence may be shown "by express recitation in the order of court that it was entered without evidence, . . ." (A-64). So there is no dispute of State law as to whether the facts are properly shown. In its initial opinion, the learned Court of Appeals acted upon the assumption that there had been evidence not preserved in a bill of exceptions so that the Court did not have facts before it

(Continued on next page)

Upon the establishment by pleadings that the contracts sold to plaintiffs and class plaintiffs were virtually identical to those held illegal by the Supreme Court of Tennessee in *Garrett vs. Forest Lawn* (*supra*, p. 2), and that the contracts sold plaintiffs and attached to their complaints were substantially the same as to those sold to large numbers of class plaintiffs, the Chancellor adjudged the contracts in issue to be illegal on the pleadings, and granted a discretionary interlocutory appeal, which is by

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([7] continued)

to consider some of the assignments of error (A-49—A-52). However, the Court reached that assumption by failing to note that the Chancellor had taken judicial notice. In quoting from the Chancellor's order upon the motions for rehearing, the learned Court of Appeals, without ellipse, bracketed material, or other indication that anything was being omitted, omitted four full lines and parts of the preceding and following lines of the learned Chancellor's order (**cf.** A-45—A-48, with A-19 and A-25), the language so omitted by the Court stating "and upon such Motion for Rehearing, the Court takes judicial notice that although this case was never set for trial after adjudication of the illegality of the contracts sold by the defendant corporation and although no testimony was heard in the case, a conference was previously held in chambers, . . .". When such appellate misstatement of the record was called to the attention of the learned Court of Appeals by petition for rehearing, the Court accepted such judicial notice as legally adequate to establish what truly occurred, but concluded that the mere fact that there was no "testimony" did not mean there was no evidence because there could have been documentary evidence (A-64). In so concluding, however, the Court of Appeals again overlooked the contents of the orders entered by the Chancellor, each of which concluded with a provision granting an appeal merely upon filing the necessary bond for judgment and costs, "no bill of exceptions being necessary **because no evidence has been received in this cause** except as such constitutes part of the technical record or consists of stipulations **as herein stated.**" (A-24 and A-29—A-30; emphasis added).

statute and judicial construction thereof limited to particular questions instead of the entire case,[8] as counsel then representing Petitioners[9] insist that *Garrett vs. Forest Lawn* was incorrect because in his view, there was no illegality unless a discount in the normal price was involved.

In granting the interlocutory appeal, the Chancellor found that all class plaintiffs were entitled to a refund and referred the case to the Master to determine the names of the class plaintiffs who had not excluded themselves, the amounts contracted to be paid and the amounts actually paid by each such class plaintiff (A-5—A-6). Upon affirmation of illegality by the Supreme Court of Tennessee on the interlocutory appeal, respondents moved merely for judgment instead of moving that the case be set for trial. As judicially noticed by the learned Chancellor, after argument of the motion for judgment following the interlocutory remand, a conference was held in the Chancellor's chambers in the nature of a pre-trial conference; at this conference, respondents' counsel brought with him books of loose leaf pages previously furnished him by counsel then representing Petitioners; each page summarized a separate customer's items purchased, total price, interest charges, balance due, date of the last payment made, and an indication of services actually furnished at that time; respondents' counsel had summarized all these pages, the Chancellor ruled each customer should receive a full refund less 25% attorney fee and Petitioners' then counsel conceded that respondents' counsel had accurately

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[8] T.C.A. § 27-305, as construed in **Tenn. Dept. of Mental Health & Mental Retardation vs. Hughes**, 531 S.W.2d 299 (Tenn., 1975).

[9] Present counsel represented Petitioner only in post-judgment proceedings, beginning with the Motions for Rehearings.

summarized the books of summary sheets, so that the Chancellor held that Petitioners stipulated the accuracy of these amounts (*infra*, A-19—A-21 and A-25—A-27). Neither the basic documents nor even the summary sheets were ever received in evidence by the Court, and such summaries by respondents' counsel, after he had deducted the attorney fee percentage and totalled this as a separate amount, were incorporated into the final judgment rendered in each case.

Faced with judgment not preceded by a trial, Petitioners filed motions for rehearing, supported by affidavits, averring errors of both State law and federal constitutional law. These were in part based upon the assertion that there were factual issues which required an evidentiary trial for resolution. It was acknowledged that the contracts were illegal in their insurance aspects but was asserted they were lawful sales of merchandise and real property not tinged with illegality, and, inasmuch as State law fully recognized the right of each "victim" of these contract sales to enforce performance as well as to demand refund, it was insisted that the class members had substantive personal rights; that the class action representational authority extended only to furnishing legal representation and did not empower a lawyer to exercise personal rights for each class member by making decisions as to whether they desired refund or enforcement. In support of this insistence, it was shown by affidavit that inflationary costs had greatly increased the price of all elements covered by the contract so that it would be a great financial loss to each customer to receive his refund of payments diminished by attorney fees; it was shown that many customers who did not send in class action exclusion elections had had conversations with respondents' personnel following issuance of the notices and had simply

indicated that they wanted nothing to do with it; that numbers of the customers had continued making payments on the contracts even after receipt of the notices; and that some of the contracts covered multi-burial lots with one spouse already buried in one of the lots and with the surviving spouse intending to be buried in the same place. Respondents contended that the subject of the actual desires of the owners of these rights would have been a subject explored in an evidentiary hearing, as well as the subject of merchandise and land covered by the contracts and believed not to be tinged with illegality.

It was further a part of the history of the case as bearing upon the motion for rehearing and appellate proceedings that the allegations of the complaints only alleged the existence of the first two types of class actions authorized by Rule 23.02, Tennessee Rules of Civil Procedure (*infra*, B-2—B-3), which are identical to the first two types authorized by Rule 23, Federal Rules of Civil Procedure, that prosecution of separate actions would create risk of adjudications which would be dispositive of the interests of absent class members and that respondents had acted on grounds generally applicable to the entire class. There were no allegations that the action fell within the third type authorized in which the Tennessee Rules, exactly copying the Federal Rules of Civil Procedure, mandate specific findings by the Court, on the basis of the four listed considerations, that a class action is the superior means of fair and efficient adjudication (F. Lawn S.Tr. 2; Mt. Olivet Tr. 2).[10] Hence, with the contracts

[10] Such references are to the official transcripts of the Chancery Court record on file in the Tennessee Court of Appeals being the transcript in the Mt. Olivet case and the transcript and a supplemental transcript (S. Tr.) in

(Continued on next page)

obviously being illegal, Petitioners took the position that each of these actions was an entirely appropriate class action to obtain an adjudication of illegality and even an injunction directing refund upon demand but was not an appropriate means of mandating refund to the Court itself and destroying each contract-holder's right to compel performance in the absence of proof that the contract-holders were aware of this right and desired refund instead of the more valuable enforcement rights.

([10] continued)

the Forest Lawn case. The learned Court of Appeals spoke critically of the "incomplete record" and the fact that the Supplemental technical record contained "selected documents" (A-49—A-52) but such criticism arose from the learned Court's unfamiliarity with the record. A supplemental transcript was necessary in the Forest Lawn case because when appeals are taken to the Supreme Court of Tennessee the record always remains in that Court's archives and on subsequent appeals, the Clerk and Masters in the State always certify the record commencing with the Supreme Court's procedendo from the prior appeal. The Supplemental record in the Forest Lawn case was present in the Court of Appeals because the Court of Appeals itself had issued certiorari requiring the Clerk and Master to send up copies of all the original record which was sent to the Supreme Court from the interlocutory appeal, plus the opinion of the Supreme Court which would have come down with the procedendo. The comments of the Court of Appeals about omissions from the record were unjustified because the record itself in each case contained a stipulation setting out the documents the Clerk and Master was required to omit, such as class action notices returned in the mail, elections to opt out of the class, correspondence of counsel, and the like (F. Lawn Tr., 35-36; Mt. Olivet Tr., 56-57). The learned Court of Appeals was also critical of references made by Petitioner Forest Lawn to the transcript complaining of actions by the Chancellor, the Court identifying the page references as referring to documents in the record obviously having nothing to do with the assignments of error (A-51); the Court was mistaken in its criticism—it was looking at the supplemental transcript containing the pleadings instead of the transcript containing the post-interlocutory appeal orders by the Chancellor.

Inasmuch as these class actions were entirely proper in their limited class action allegation, no arguable violation of the Constitution of the United States occurred until rights were infringed by the entry of judgment without trial and without evidence. Hence the first assertions made by Petitioners of such constitutional violations were made in the motions for rehearing in the Chancery Court and were preserved in the Court of Appeals by assigning the Chancellor's actions as error and by asserting in the "brief"[11] the propositions of law claimed to have rendered his legal decisions erroneous. Because of their length, excerpts from these documents are separately printed in Appendix C.

ARGUMENT

No case arising within the federal judicial system can possibly bring before this Court fundamental issues of due process jurisdictional requisites in class action cases as does the instant case. ***Eisen v. Carlisle & Jacquelin***, 417 U.S. 156, demonstrated that the 1966 Amendment to Rule 23, F.R.C.P., was constitutional in inspiration. Both that decision and ***Singleton v. Wulff***, 428 U.S. 106, as simultaneously applied in ***Planned Parenthood of Central Missouri v. Danforth***, 428 U.S. 52, 63, n. 2, effectively restricted the power of federal courts to litigate for absent parties for want of a fair basis to claim the right to represent them due either to lack of notice or lack of membership in the class which sustained the particular injury. But with the care taken in framing and

[11] The brief, in Tennessee appellate practice, is required to consist solely of statements of propositions of law with supporting authorities and the argument is optional and is required to be presented separately.

amending the Federal Rules of Civil Procedure to assure non-conflict with the Constitution, and in light of the judicial obligation to refrain from constitutional adjudication wherein lesser means can resolve disputes, most cases arising within the federal judicial system are apt to be "statutory" construction cases, as are those just cited.

It is when State governments move to adopt verbatim or with little change the various sets of Federal procedural rules that true constitutional issues arise. Presumably, decisions by this Court construing such Federal Rules are not binding upon State courts in construing rules framed in identical language, for such then become a matter of State law, and the teaching of this Court's decisions can remain unread and unheeded both by bench and bar.

These consolidated cases raise fundamental and important due process questions. It raises them within a unique framework. In the common run even of important class action cases, about all the large number of absent parties stand to lose is the right to personally litigate in situations in which they probably would never think of litigating anyway. Injunctions to remove impediments to abortion will benefit such absent people just as much whether they are parties to the litigation or not; and even in class action damage suits, the amount of damages to be recovered by most of the absent victims is limited to a small illegal charge within a stock broker's commission, the price of a worthless bottle of medicine, or the like — the only real beneficiary in much class action litigation is often the body of consumers at large or a plaintiff's attorney whose fee will be based upon the conglomerated recoveries of many class plaintiffs instead of merely his own client's recoveries.

In the instant case, however, each absent case plaintiff stood to lose far more by actual cancellation of his contract than he stood to gain by enforcing it, and State law clearly secured to him the right to compel these petitioners to perform. Yet the class action notice gave no indication to the people that they had such valuable enforcement rights even if the contracts were totally legal, nor that someone was presuming to exercise for each of them the personal right of election between the opposing refund and cancellation rights. There was no action by plaintiffs nor even a judicial suggestion that they should sue a representative class of defendants who purchased such contracts, appreciated the value of their enforcement rights, and while willing to accept a declaration of illegality, would also be willing to defend the contracts against wholesale cancellation — cancellation achieved in ignorance of how many of the customers might be too senile to read and understand the class action notices even if those notices had been informative.

To one who has not read extensively and pondered deeply in class action theory and its gradual development in judicial decisions and then in procedural rules, Rule 23, F.R.C.P., and the rules of various states which have adopted it with or without modification, is a welter of words. *Every time* a case arises which should be classified as one presenting problems as to whether questions of law or fact common to all class-members predominate over questions affecting only individual members, it can also be said that separate litigation by class plaintiffs would create risks of inconsistent adjudications imposing incompatible standards upon the defendant and it can be assumed that adjudication in individual cases would be dispositive of the interests of non-parties "as a practical

matter . . ." (Rule 23(b), F.R.C.P.; Rule 23.02, T.R.C.P., *infra*, B-2—B-3). Such inclusion furnishes a natural temptation both to counsel and State judges who have not studied class action theory in depth to avoid the difficult issues and often the evidentiary proceeding necessitated by considering the pertinent matters listed in Rule 23(b)(3), F.R.C.P., and its State counterpart, Rule 23.02(3), T.R.C.P., *infra*, B-2—B-3, but to utilize *some* type of notice adapted to the notice requirements for cases in which the propriety of proceeding as a class action is a more grave and complex question (Rule 23(c)(2), F.R.C.P. and Rule 23.03(2), T.R.C.P., *infra*, B-2—B-3).

This case brings together the fundamentals of class action theory and the fundamentals of due process requisites of the judicial power to adjudicate. While it is immaterial whether the grant of certiorari and eventual reversal would mean the difference between solvency and insolvency to these Petitioners, a decision by this Court upon the combined elements here present, premised upon the constitutional limitations of power instead of upon statutory construction of written rules, would furnish protection both to class plaintiffs and to individual defendants in states throughout the nation and would have the capacity to enlighten Federaljudges in their solution of statutory construction problems.

This Court has held that the Due Process Clause of the Fourteenth Amendment to the Constitution prohibits each state from judicially forfeiting an individual's valuable property rights except by prior actual service of notice in a manner *affirmatively* required by law as distinguished from some mere extra-official or casual notice which only extends to the individual an informal privilege of

appearing, *Coe v. Armour Fertilizer Works*, 327 U.S. 413, which decision was predated by earlier fundamental decisions and has flowed into more recent decisions adhering to the same principle. The second and simplest issue presented in this case is whether a state can by adjudication destroy the valuable rights of contract-holders when the record affirmatively establishes that such individuals did not receive the official court notices but received only letters from these Petitioners advising them of their right to exclude themselves from the litigation and presumably trying to persuade them to so act.

The first question is more complex and of greater import to the probable course of much future litigation throughout the nation, but it is certainly no less fundamental than is the second question. *Eisen v. Carlisle & Jacquelin*, *supra*, establishes that the Fifth Amendment's Due Process mandate is inherent in Rule 23(b)(3) and (c)(2), F.R.C.P., and this case presents the issue of whether State proceedings which do not conform to those precepts are valid under the Due Process Clause of the Fourteenth Amendment. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, established that judicial enforcement or nullification of individual rights cannot constitutionally be achieved except by service of notice whose contents actually inform such class member of sufficient facts to enable him to elect whether to be bound by defaulting or whether to fight by contesting. No such notice adequate for intelligent decision was given in this case although the decision given was wholly adequate for the only type of class action correctly alleged to exist in the complaint's allegations, as distinguished from its prayers —a class action for declaratory judgment of illegality and right to refund and/or injunction mandating the actual

making of refunds upon demand by individual customers. This Court has held that personal property rights, even in the form of a *res* within the jurisdiction of a court cannot be destroyed by adjudication except upon *adequate* notice either to individual owners of rights or to *defensive* class representatives of such owners, *Schroeder v. City of New York*, 371 U.S. 208. In this case, such rights are actually destroyed and respondents given powerful immunity from future judicial compulsion by judicial proceedings mandating the payment of refunds to the clerk of a court without any court in Tennessee's judicial system having any basis for concluding that the individual customers had knowledge that they were vested with valuable enforcement rights which could survive a mere adjudication that they had an equal right to demand and receive refunds. This Court has held that adjudications purporting to bind the rights of absent class members whose legally identical interests were not defended upon the merits cannot be enforced against sub-classes who might *desire* the opposite result, when there were no class representatives in the litigation speaking for them and defending such opposing right, *Hansberry v. Lee*, 311 U.S. 32. Unknown members of such sub-class, still ignorant of their enforcement rights, will have this judgment automatically enforced against them by virtue of payment of the money into court, or else these Petitioners will be subject to compulsion that they perform for the consideration they received even after they refunded the consideration.[12]

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[12] By stipulation contained in the orders entered by the Chancellor upon the motions for rehearing, it is established that some individuals whose class action notices issued by the Court were **not** returned undelivered had correspondence directed to them by respondents returned undelivered by the same Postal service. With the possibility that recipients may not have received the undelivered mail, the conclusion of receipt by any class member other than those who opted out is pure surmise.

This Court has held that when judicial proceedings are designed to take or forfeit individual rights, it is a mandate of due process of law and not a mere procedural rule that the party seeking such forfeiture of individual rights must prove the existence of every element imposed by law as a condition to taking such rights, *Washington ex rel. Oregon R.R. and Navigation Co. v. Fairchild*, 224 U.S. 510, which implies at the very least an evidentiary hearing with the right to produce evidence contradicting the affirmative. No such opportunity was presented in this case.

Numerous lines of decisions by this Court, long-standing and well-recognized, come together in this case confronting the theoretical foundation of class action adjudication, as developed from the English common law decisions flowing into the present wording of Rule 23 of both the Federal and the Tennessee Rules of Civil Procedure. The case is one proper for review upon certiorari.

WHEREFORE, Petitioners respectfully pray issuance of the writ of certiorari.

Respectfully submitted,

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OF COUNSEL:

BRANSTETTER, MOODY & KILGORE

Appendices

APPENDIX A

[DECREE ENTERED AUGUST 21, 1974—
M.B. 90, PAGE 563]

[1]

IN PART II OF THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

MR. and MRS. GEORGE E. AYRES, PLAINTIFFS VS. FOREST LAWN MEMORIAL GARDENS, INC.; FOREST LAWN MEMORIAL MEMBERSHIP ASSOCIATION, and H. WINSTON LIGON, d/b/a FOREST LAWN MEMORIAL GARDENS, DEFENDANTS	NO. A-3790-A

ORDER

This cause came on to be heard upon the entire record and particularly upon the motion of the Plaintiffs to sustain this cause as a class action, to define the class or classes and to direct the parties as to notice and argument of counsel, from all of which it appeared to the Court that the

Motion is proper and should be sustained and that the action should be sustained as a class action, the class defined and directions given to the parties as to notice.

It is, therefore, ORDERED, ADJUDGED AND DECREED that this suit be and the same is hereby sustained as a class action. It is further ORDERED that the class is presently defined subject to later amendments or additions as being "holders of contracts with Forest Lawn Memorial Gardens or Forest Lawn Memorial Membership Association, a division of Forest Lawn Memorial Gardens, Inc., identical or similar to those filed as exhibits to the original bill by the terms of which a membership fee is charged such holder and wherein an interment or funeral service is guaranteed such holder for a specific price or sum of money by one of a particular list of mortuaries." It is further ORDERED that the Defendants will deliver to counsel for Plaintiffs, within thirty (30) days from

[2]

the entry of this Order, a complete list containing both the names and last known addresses of all parties who now hold or have ever held a contract with the Defendants, or any of them, by the terms of which such contract holder is made a member of any association bearing the name of any of the Defendants hereto and in which such member is afforded an interment or funeral service at a cost not to exceed a fixed amount.

It is further ORDERED that the Plaintiff shall prepare notices to each of the parties whose names shall be furnished to Plaintiffs as hereinabove ordered enclosing such notice in an addressed envelope with proper postage attached and deliver the same to the Clerk and Master of

this Court for mailing by the Clerk and Master, all at the present expense of the Plaintiffs with such expense to be ultimately paid as a part of the costs in this cause. The form of such notice to be agreed upon between the parties and submitted to the Court for approval or in the event of their inability to agree to be fixed by the Court.

All other matters are reserved.

APPROVED FOR ENTRY:

HOOKER, KEEBLE, DODSON & HARRIS

BY /s/ TYREE B. HARRIS
Attorneys for Plaintiffs

TAYLOR, SCHLATER, LASSITER & TIDWELL

BY /s/ ROBERT L. TRENTHAM
Attorneys for Defendants

/s/ ED S. DAVIS
CHANCELLOR

[DECREE ENTERED NOVEMBER 14, 1975—
M.B. 94, PAGE 681]

[1]

IN PART II OF THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE

MR. AND MRS. GEORGE E. AYRES, ET AL PLAINTIFFS VS. FOREST LAWN MEMORIAL GARDENS, INC.; FOREST LAWN MEMORIAL MEMBERSHIP ASSOCIATION, and H. WINSTON LIGON, d/b/a FOREST LAWN MEMORIAL GARDENS, DEFENDANTS	NO. A-3790-A

ORDER

This cause came on to be heard upon the entire record, and particularly upon the motion of the plaintiffs for a judgment declaring the contracts involved, to be invalid and for an order of reference to fix the amount owed by the defendants and argument of counsel, from all of which it appeared that the parties agreed that the contracts involved in this litigation were typified by those contracts which were filed as exhibits to the original complaint, and

it appearing to the Court that the contracts involved in this litigation were identical or practically identical to the contract which was before the Supreme Court of Tennessee in the case of Claude Garrett and John C. Garrett, Jr., d/b/a Cole and Garrett Funeral Directors v. Forest Lawn Memorial Gardens, Inc. and, therefore, for the reasons set out in the opinion of the Supreme Court in the former case, the contracts now before the Court were invalid as being in violation of the law of the State of Tennessee, and it further appearing to the Court that this is a proper case for a reference to determine the remaining members of the class and the amount of refund which said class members have paid on their individual contracts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the contracts issued to the plaintiffs and to all other members of the class represented by the plaintiffs other than those who have exercised their option not to be included within the said class, be and the same are hereby declared invalid and unlawful as violative of the laws of the State of Tennessee.

[2]

IT IS FURTHER ORDERED, that the plaintiffs and all other members of the class who have not exercised their option to remove themselves therefrom be and they are entitled to a refund of all monies contracted to be paid under such contracts.

IT IS FURTHER ORDERED, that this cause be and the same is hereby referred to the Master to answer the following issues upon such proof as may be submitted to them:

1. The names of all the plaintiffs and other members of the class heretofore determined to have not exercised their option to remove themselves therefrom.

2. The amounts of money which each member of the remaining class has contracted to pay to the defendants, or any of them, by virtue of the terms of the contracts hereinabove declared to be invalid.

3. The amounts of money actually paid by each remaining member of the class, the dates the payments were commenced, and the dates the payments were terminated as to each remaining member of the class.

All other matters will be reserved pending the incoming of the Master's report.

To the action of the Court in finding the contracts filed as exhibits to the complaint to be invalid contracts, the defendants respectfully except and pray a discretionary appeal to the next term of the Supreme Court sitting at Nashville. And the Court being of the opinion that the determination of the validity of such contracts is a controlling question of law as to which there is substantial ground for difference of opinion, and the Court being further of the opinion that an immediate appeal from such order may materially advance the ultimate determination of this litigation, the Court in the exercise of its discretion grants the discretionary appeal and the defendants are given 30 days

[3]

within which to file their appeal bond and otherwise protect their appeal, and 90 days within which to prepare and file the Bill of Exceptions.

/s/ C. ALLEN HIGH
CHANCELLOR

APPROVED FOR ENTRY:

HOOKER, KEEBLE, DODSON & HARRIS

By: /s/ TYREE B. HARRIS
Attorneys for Plaintiffs

TAYLOR, SCHLATER, LASSITER & TIDWELL

By: /s/ ROBERT L. TRENTHAM
Attorneys for Defendants

[1]

May 17, 1976

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FOREST LAWN MEMORIAL GARDENS, INC., ET AL., Appellants, V. MR. & MRS. GEORGE E. AYRES, ET AL., Appellees.	)	Davidson Equity Hon. C. Allen High Chancellor

For Appellants:

Robert C. Taylor
Nashville, Tennessee

Robert L. Trentham
Nashville, Tennessee

For Appellees:

Tyree B. Harris
Hooker, Keeble, Dodson & Harris
Nashville, Tennessee

AFFIRMED & REMANDED BROCK, J.

[2]

This is a class action challenging the validity of certain pre-burial contracts as unlawful contracts of insurance. The trial court determined that said contracts

between appellee class and Forest Lawn Memorial Gardens, Inc., or division thereof were invalid as alleged. Appellees represent a class consisting of all individuals holding contracts with appellants that, generally, provide for the sale of a funeral at a fixed price (a price available only to members of the cemetery association) upon the payment of a membership fee of $100.00.

The trial court found that the contracts involved in this litigation were identical in all material respects to the contract that was before this Court in *Garrett v. Forest Lawn Memorial Gardens, Inc.*, Tenn., 505 S.W.2d 705 (1974) and, upon that authority, declared the contracts *sub judice* invalid as violative of the laws of the State of Tennessee. See T.C.A. §§ 56-1101, 56-3201, 56-3205—56-3211.

We agree with the trial court and the position of the appellees that the question of the validity of the contracts under consideration herein is controlled by the decision of this Court in the *Garrett* case, *supra*. As insurance contracts employed for the purpose of controlling the funeral business, such contracts are illegal. 505 S.W.2d at 710. We reaffirm our holding in *Garrett* and, therefore, hold that the trial court correctly rescinded the contracts issued by appellants to the members of the class represented herein and correctly ordered the refund of all monies paid under such contracts.

Appellants do not contest the trial court's finding of substantial identity between the contracts considered

[2]

herein and the contract invalidated by the Court in *Garrett*. Rather appellants urge our reconsideration of

Garrett, arguing that their obligation to furnish a funeral service is not an insurance contract since it is not conditioned upon the death of the purchaser but rather upon the purchaser's legal representative's exercise of his option to purchase a funeral at the price fixed in the contract and upon payment of the purchase price at time of need. It is unclear, however, how appellants' construction of the contractual arrangement could modify our holding in the instant case since such an irrevocable offer to sell, conditioned upon purchaser's death, is plainly "some act of value" within the meaning of our statute defining insurance contracts. See T.C.A. § 56-1101. We therefore, hold that the trial court did not err in declaring the contracts involved in this litigation invalid and unlawful as violative of the laws of the State of Tennessee.

The judgment of the trial court is affirmed and the cause remanded to the trial court for further proceedings. Appellants will pay the costs incurred on appeal.

/s/ Ray Brock
BROCK, J.

CONCUR:

FONES, C.J.
COOPER, J.
HENRY, J.
HARBISON, J.

[1]

IN PART II OF THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

MR. AND MRS. GEORGE E. AYRES, ET AL, Individually, and as Representatives of a Class	)	
VS.	)	NO. A-3790-A
FOREST LAWN MEMORIAL GARDENS, INC., ET AL	)	

ORDER

This cause came on to be further heard before the Court by the introduction of further evidence and particularly by the submission to the Court of certain records furnished by the defendants setting forth the names of the individuals holding contracts with the defendants who had not opted themselves out of the litigation in question and such records further show the amount of money paid by each of the contract holders with the date of the contract and the date of such contract holders' last payment being further shown and it appearing to the Court that the information contained in the records is accurate and that in view of such information being before the Court, it is no longer necessary to proceed with the reference to the Master heretofore ordered by Decree of this Court entered November 14, 1975, of record in Minute Book 94, Page 681.

IT IS, THEREFORE, ORDERED that the aforesaid reference be and the same is hereby set aside.

[2]

Upon the statement of counsel of the Defendants that Forest Lawn Memorial Gardens, is, in fact, Forest Lawn Memorial Gardens, Inc. and that Forest Lawn Memorial Membership Association is an operating division of Forest Lawn Memorial Gardens, Inc., the Court so finds as a fact and that, therefore, a judgment is properly rendered against Forest Lawn Memorial Gardens, Inc. only.

It further appeared to the Court that only three questions remained to be answered, the first being the manner in which the individual contract holders, whose contracts had not been fully paid and whose balances thereon were represented by negotiable instruments held by holders in due course should be protected against further claims thereon.

It appearing to the Court that the amount owed by each individual contract holder on such contracts is not presently before the Court, but it appearing that the defendant, Forest Lawn Memorial Gardens, Inc., is liable upon all such contracts as endorser. The Court is of opinion that such contract holders would be adequately protected by an Order against the defendant, Forest Lawn Memorial Gardens, Inc., to hold such contract holders harmless thereon.

The second question presented to the Court was whether or not interest should be awarded to the contract holders on the monies paid by them to the defendant and, if so, the manner in which said interest should be figured. On this issue the Court finds that the said contract holders

should be awarded interest at the rate of six (6%) per cent per annum, the Court being of

[3]

the opinion that interest upon the refunds due the various contract holders should be figured on the total amount of the refund from a date one-half way in point of time between the date of the purchase of the contract and the date of the last payment thereon. The Court is further of the opinion that, in view of the fact that some amount was paid in a lump sum at the time of the purchase of each contract, this formula operates slightly to the disadvantage of the contract holder and that for this reason in the event interest for the entire period upon which interest is figured should result in any fractional interest rate, that the interest rate should be increased to the next full percentage point. The Court finds that under the foregoing formula and as further shown by the records furnished to the Court by the defendant that the defendant is indebted to the contract holders in the principal amount of $77,079.08, and interest in the amount of $20,022.44, making a total judgment of $97,101.52, which said amount should be paid out in the manner hereinafter directed.

Finally, the Court was required to pass upon the amount of attorneys' fees which should be paid to the law firm of Dodson, Harris & Aden out of the aforesaid judgment for their services rendered as attorneys for the class which fee the Court fixes at twenty-five (25%) per cent of the total recovery.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED that the defendant, Forest Lawn Memorial Gardens, Inc., will protect and hold harmless each of the contract holders whose

[4]

names are hereinafter set out as being entitled to receive monies from this cause from any and all liability upon any notes or contracts signed by them for the purchase of those contracts declared by this litigation to be illegal.

It is further ordered that in the event any such contract holder should be required to pay the balance owed on any such contract then and in that event the right is hereby reserved to such contract holder to maintain a separate action against Forest Lawn Memorial Gardens, Inc. for the amount thus paid, together with interest and attorneys fees.

It is further ordered that a judgment be and the same is hereby entered against the defendant, Forest Lawn Memorial Gardens, Inc., in the amount of $97,101.52.

It is further ordered that interest on this judgment shall commence as of October 1, 1976 at the rate of eight (8%) per cent per annum, which for simplicity's sake, will become due at the rate of one (1%) per cent on each of the following dates: October 2, November 16, January 2,, February 16, April 2, May 16, July 2, and August 16.

It is further ordered that the judgment will be paid out by the Clerk and Master in the following amounts, together with interest accruing from the entry of this Order:

[5]

Dodson, Harris & Aden	$24,310.86
George E. & Katherine Ayer	691.84
Willie G. Jr. & Ada L. Hitt	643.75

James A. & Altie Russell	544.26
Raymond C. & Mable E. Brown	924.46
Joseph E. & Ann Nannie Johnson	195.98
Wm. J. Agee	777.90
Marie Williams	183.75
Charles E. Burton (Mrs. Geraldine M.)	412.13
Gale H. & Kathleen Hanna	930.30
Mrs. Parker W. Bramble	200.92
Marery S. Finch	124.99
Harris B. Bradley	196.88
Jimmy G. & Susie Baker	987.82
John R. & Ruby L. Daniel	834.44
Homer Binkley	204.75
William J. Eldridge	203.44
Thomas W. Jr. & Peggy Dailey	724.42
Clyde O. Brooks & Clellie L.	697.66
James L. Martin Jr. & Mildred	471.58
Roger D. Beckham & Linda	800.62
James Adamson, Jr. & Annette	675.80
Dewey B. Batts & Rose	811.72
Charles H. Borges & Doris L.	791.01
Robert H. Dorothy Ozanne	680.66
Casper E. Butler & Ann	690.39
McCoy & Katherine Adamson	778.06
Albert D. & Lelia Sandridge	666.08
Mrs. John W. Farler	185.06
Sam M. & Ava Lowery	600.23
Kenneth B. Jr. & Lovella Jones	228.31
Carolyn Edwards	326.58
Elton E. & Katherine Teasley	629.89
John W. Lewis & Virginia	629.12
Irvin R. Phelon Sr. & Elizabeth	822.97
James L. & Anita Mabry	723.61
John D. & Reba N. Case	687.64

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Howard E. Frost & Barbara	636.13
James F. & Lula Hunt	631.08
Jesse & Vondell Powell	1195.36
Raymond & Minnie Thompson	1141.51
Emil L. & Barbara Randall	736.33
Drew B. & Minnie Hastings	663.38
James A. Wilkes & Nedra F.	708.90
Lorraine Goodwin	98.25
Edwin E. Hoback & Wilma R.	774.54
Willie J. Meador & Dianne H.	1006.00
L. D., Sr. & Dorothy Brannon	732.76
John H. & Lela H. Charlton	799.51
Charles W. & Elizabeth V. Head	1559.96
Lloyd J. & Emma Lee Hunter	1214.20
Troy D. & Virginia Watson	925.17
William E. & Vedie W. Fuqua	794.25
Archie R. & Joy G. Spain	758.57
Robert L. & Dearah A. Henley	1078.42
Rodney N. & Hassie M. Boyd	1058.01
G. B. & Patricia A. Proctor	850.64
James B. & Pauline Gammon	777.38
Hulen H. & Gertrude Vanlandingham	927.15
Henry E. & Doris B. Johnson	1397.44
John V., Jr. & Ruth M. Ferrell	1151.53

[6]

George C. & Margie E. Lester	1017.69
Jerry L. & Diane L. Hall	1104.66
Donald E. & Nellie Gann	631.87
Robert D. & Mary A. Morrison	1036.11
Bobby R. & Mary I. Gay	412.56
Paul T. Calloway & Helen B.	630.97
Alvis C. & Mary J. Leslie	269.56

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Claude J. & Marjorie D. Fleming	897.76
Joseph C. & Mary L. Gilbert	93.75
Buster C. Cathey & Linda D.	824.67
James O. Jones & Mary	691.00
Billy & Bonnie Binkley	1046.61
Elmer T., Jr. & Regina Leighton	460.12
Charles E. & Patricia Peyton	892.71
Rachel O. Wilson	197.48
Jerry & Glenda Spurlock	987.52
Albert & Linda Hughes	1122.20
Hillard E. & Nancy Brown	871.47
James A. & Velma L. Johnson	1233.60
Mrs. Janie F. Draper	74.50
James C. & Marjorie A. Heath	947.32
Sam N. & Mardelle J. Stephens	1101.00
Ada C. Mosley	95.00
Larry A. & Wanda Perry	816.57
John H. & Eva Gail Butterworth	837.65
Robert L. Reasonover, Sr. & Mary	763.61
Wallace & Lois L. Williams	838.32
Horace S. Wakefield & Anita M.	876.76
Everett A. & Katherine Kiester	1397.25
William & Edith Tucker	198.56
Daid & Anne Miller	862.08
Thomas E. Simmons & Ursula D.	907.06
Joseph J. Heintz, Jr.	98.96
Harry A. & Mary Childress	310.56
Dr. Elmer & Grace Bottsford	971.85
Willie G. & Bonnie Holliman	830.66
Robert F. & Sue McDaniel	843.69
Leo & Anna Willis	453.48
Powell & Rosalyn Wyatt	789.50
Armand G. & Jean Hartwell	684.56

Order

Clarence A. Hall	680.66
Georgia W. & Willie M. Harger	693.26

It is further ordered that the foregoing judgment represents payments made by the named contract holders through the month of July, 1976, therefore, this Order is entered without prejudice to the rights of any of the above included contract holders to claim repayment by action in law or otherwise for payments made by them on such contracts on and after August 1, 1976.

[7]

The costs of this cause are taxed against the defendants for which execution may issue, if necessary.

It further appears that the parties had earlier agreed that this Order should be entered prior to October 1, 1976. It is, therefore, Ordered that this Order be and the same is hereby entered nunc pro tunc as of September 30, 1976 for all purposes including interest.

_____
CHANCELLOR

DODSON, HARRIS & ADEN
900 Nashville City Bank Building
P. O. Box 2524
Nashville, Tennessee 37219

By: _____
Tyree B. Harris

Attorneys for Plaintiffs

TAYLOR, SCHLATER, LASSITER & TIDWELL
24th Floor, Life & Casualty Tower
Nashville, Tennessee 37219

By: _____

Attorneys for Defendant

[DECREE ENTERED APRIL 1, 1977 — M.B. 101, PAGE 437]

[1]

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

MR. & MRS. GEORGE E. AYERS, et al., Plaintiffs, -vs- FOREST LAWN MEMORIAL GARDENS, INC., et al., Defendants.	NO. A-3790-A

ORDER

This cause came on further to be heard before the Hon. C. Allen High, Chancellor, upon the Motion for Rehearing, upon the entire record in this cause, and upon argument of counsel in open court, followed by a hearing subsequently held by the Court in Chambers, and upon such Motion for Rehearing, the Court takes judicial notice that although this case was never set for trial after adjudication of the illegality of the contracts sold by the defendant corporation and although no testimoney was heard in the case, a conference (in the nature of a pre-trial conference) was previously held in chambers, following the adjudication of illegality of the contracts and following

remand of the case from the Supreme Court of Tennessee; that in such hearing or conference, there were presented certain books which had previously been delivered by counsel then representing the defendants to counsel for plaintiffs; that these books contained loose leaf pages, with one page for each contract-holder held to be a member of the class; that each such page listed the total items purchased under the contract, whether future funeral services, option to purchase a vault upon need, full payment for such vault, a burial lot or lots, memorials, or only one or more of the said

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items, such information being represented to the Court by defense counsel as having been abstracted from the original records of Forest Law Memorial Gardens; and for each such contract, the form showed the date that the contract was entered into, the prices of the various items, and any interest charges made, the total contract price, and the date of the last payment made by such contract-holders, with comments showing the actual furnishing of services on those contracts for which some of the services have already been furnished at that time. And the Court holding that adjudication of illegality of the contracts established generally a duty on the part of the defendants to refund monies received by them, and that such adjudication, taken with the class action adjudication, established a specific duty on the part of the defendants to make refund to all those property adjudged to be members of the class, and it not being contended except to the extents specifically raised in the Motion for Rehearing, that counsel for plaintiff has not properly made computations from such abstracts as to total amount paid by each contract-holder,

nor that he improperly computed interest on each contract from the mean date between the date of such contract and the last payment that had been made thereon as of the time of compilation of such abstracts, the Court holds that the listing of individual class members and the amounts due them in the final judgment heretofore entered were and constituted a stipulation by plaintiffs' counsel and counsel then representing defendants that each such figure consisted of total payments made by the contract-holder, plus interest thereon computed from the date at mid-point between the date of the contract and the date of the last payment thereon, less an attorney fee of 25% and less the value of the services, if any, provided by the defendants to the contract-holder; to which holding by the Court the defendants did not object and do not now except. The Court then concluded that the judgment is proper and correct except for individuals included in the class who may not properly have been includable therein for the lack of notice.

[3]

The Court further determined and held, in regard to those individuals listed in Paragraph 1 of the defendants' Motion for a New Trial, whose notices mailed by the Clerk and Master had been returned undelivered by the Postal Service, that there should be a referral to the Clerk and Master for the purpose of hearing proof and reporting the answer to the question, "What notice, if any, did those individuals whose names appear in Paragraph 1 of the defendants' Motion for a Rehearing receive concerning pendency of this cause?" Thereupon, in an effort to avoid the necessity of such a reference, the parties stipulated and do now stipulate to the following facts:

That approximately simultaneously with the mailing of class-action notices by the Clerk and Master, the defendants mailed envelopes to each of the individuals to whom the Clerk and Master addressed the class-action notices, such envelopes containing a form letter from the defendants, a form letter from the attorney then representing the defendants, and a suggested form for use by the addressee in requesting exclusion from the class but not containing a copy of the Clerk and Master's notice; and that, although many of the envelopes mailed by defendants were returned, none of the envelopes mailed by defendants to the individuals listed in Paragraph 1 of the defendants' Motion for Rehearing were returned to defendants by the U.S. Postal Service except those mailed to Charles E. (Mrs. Geraldine M,) Burton, William J. Eldridge, Casper E. and Ann Butler, Carolina Edwards (moved out of the state). John W. and Virginia Lewis, Hillard E. and Nancy Brown, and Everett A. and Catherine Kiester. It is further stipulated that the defendants did not mail notices to any contract-holders as authorized by the Court's Decree of December 20, 1974.

WHEREUPON, the Court held that the individuals listed in

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the stipulation appearing in the next preceeding paragraph should be deleted from the class and from the judgment, and that 11 others listed in Paragraph 1 of the defendants' Motion for Rehearing were properly included in the class.

IT IS FURTHER ORDERED by the Court that the Motion for Rehearing is granted to the extent of eliminating from

the judgment those individuals listed in the said stipulation herein contained, whose claims total $4,532.38, and attorney fees thereon in the amount of $1,482.92, totaling $6,013.30.

IT IS FURTHER ORDERED that the judgment for the remaining balance of $91,088.22, together with accrued interest thereon, is hereby made final, for which execution may issue if necessary.

IT IS FURTHER ORDERED that to the extent that the defendants have furnished funeral services and goods to class members since the preparation by the defendant of the book outlining the then status of each contract-holder's account, which book was furnished to the attorney for the plaintiff by the defendants, and from which the amount of each individual judgment was determined, the defendants did so at their own peril, and are not entitled to any diminution in the judgment for any such services furnished; and it is unnecessary to hold any evidentiary hearing to determine the extent to which defendants may furnished goods and services to contract-holders wince the preparation of the aforesaid book.

IT IS FURTHER ORDERED that all the remaining grounds of defendants' Motion for Rehearing be and the same are hereby overruled.

To the action of the Court in sustaining that portion

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of the motion to rehear which was sustained, the plaintiffs respectfully except.

To the action of the Court in overruling all of the remaining grounds of its Motion for Rehearing except those

above sustained, the defendants respectfully except, pray, and are allowed an appeal to the Court of Appeals of Tennessee, Middle Section, upon filing a bond conditioned as required by law; no bill of exceptions being necessary because no evidence has been received in this cause except as such constitutes part of the technical record or consists of stipulations as herein stated.

/s/ C. ALLEN HIGH
CHANCELLOR

APPROVED FOR ENTRY:

DODSON, HARRIS & ADEN

/s/ TYREE B. HARRIS
Attorneys for Plaintiffs

BRANSTETTER, MOODY & KILGORE

/s/ CECIL D. BRANSTETTER
Attorneys for Defendants

[1]

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

CHARLES D. ALLISON and wife, IRENE ALLISON, Plaintiffs,	)	
-vs-	)	NO. A-3790
MT. OLIVET CEMETERY CO., Defendant.	)	

ORDER

This cause came on further to be heard before the Hon. C. Allen High, Chancellor, upon the Motion for Rehearing, upon the entire record in this cause, and upon argument of counsel in open court, followed by a hearing subsequently held by the Court in Chambers, and upon such Motion for Rehearing, the Court takes judicial notice that although this case was never set for trial after adjudication of the illegality of the contracts sold by the defendant corporation and although no testimony was heard in the case, a conference (in the nature of a pre-trial conference) was previously held in chambers, following the adjudication of illegality of the contracts and following remand of the companion case, ***Ayers, et al. v. Forest Lawn Memorial Gardens, Inc., et al.***, No. A-3790-A, from the Supreme Court of Tennessee; that in such hearing or conference, there were presented certain books

which had previously been delivered by counsel then representing the defendant to counsel for plaintiff; that these books contained loose leaf pages, with one page for each contract-holder held to be a member of the class; that each such page listed the total items purchased under the contract, whether future funeral services, option to purchase a

vault upon need, full payment for such vault, a burial lot or lots, memorials, or only one or more of the said items, such information being represented to the Court by defense counsel as having been abstracted from the original records of Mt. Olivet Cemetery Company; and for each such contract, the form showed the date that the contract was entered into, the prices of the various items and any interest charges made, the total contract price, and the date of the last payment made by such contract-holders, which comments showed the actual furnishing of services under those contracts for which some of the services had already been furnished at that time. And the Court holding that the adjudication of illegality of the contracts established generally a duty on the part of the defendant to refund monies received by it, and that such adjudication, taken with the class action adjudication, established a specific duty on the part of the defendant to make refund to all those properly adjudged to be members of the class, and it not being contended except to the extent specifically raised in the Motion for Rehearing, that counsel for plaintiff has not properly made computations from such abstracts as to total amount paid by each contract-holder, nor that he improperly computed interest on each contract from the

mean date between the date of such contract and the last payment that had been made thereon as of the time of compilation of such abstracts, the Court holds that the listing of individual class members and the amounts due them in the final judgment heretofore entered were and constituted a stipulation by plaintiffs' counsel and counsel then representing defendants that each such figure consisted of total payments made by the contract-holder, plus interest thereon computed from the date at mid-point between the date of the contract and the date of the last payment thereon, less an attorney fee of 25% and less the value of the services, if any, provided by the defendant to the contract-holder; to which holding by the Court the defendant did not object and does not now except. The Court then concluded that the judgment is proper and correct except for

the class or who may not properly have been includable therein for their lack of notice.

The Court further determined and held, in regard to those individuals listed in Paragraph 2 of the defendant's Motion for a New Trial, whose notices mailed by the Clerk and Master had been returned undelivered by the Postal Service, that there should be a referral to the Clerk and Master for the purpose of hearing proof and reporting the answer to the question, "What notice, if any, did those individuals whose names appear in Paragraph 2 of the defendant's Motion for a Rehearing receive concerning pendency of this cause?" Thereupon, in an effort to avoid the necessity of such a reference, the parties stipulated and do now stipulate to the following facts:

That approximately simultaneously with the mailing of class-action notices by the Clerk and Master, the defendant mailed envelopes to each of the individuals to whom the Clerk and Master addressed the class-action notices, such envelopes containing a form letter from the defendant, a form letter from the attorney then representing the defendant, and a suggested form for use by the addressee in requesting exclusion from the class, but not containing a copy of the Clerk and Master's notice; and that, although many of the envelopes mailed by defendant to the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were returned, none of the envelopes mailed by defendant to the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were returned to defendant by the U.S. Postal Service. Whereupon, the Court held that the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were properly included in the class. It is further stipulated that the defendant did not mail notices to any contract-holders as authorized by the Court's decree of December 20, 1976.

IT IS THEREFORE ORDERED that three contract-holders, to wit, Robert W. Wray, Fanny C. Curtis, and Alexander S. and Saline Caldwell, were included within the class although they had each filed elections to be excluded and that, therefore, their claims collectively totaling $1,810.23 and attorney fees thereon in the amount of $572.56 are withdrawn from the judgment;

IT IS FURTHER ORDERED that to the extent that the defendant has furnished funeral services and goods to class members since the preparation by the defendant of the book outlining the then status of each contract-holder's account, which book was furnished to the attorney for the plaintiff by the defendant, and from which the amount of each individual judgment was determined, the defendant did so at its own peril, and it is not entitled to any diminution in the judgment for any such services furnished; as it is unnecessary to hold any evidentiary hearing to determine the extent to which defendant furnished goods and services to contract-holders since the preparation of the aforesaid book.

IT IS FURTHER ORDERED that all the remaining grounds of defendant's Motion for Rehearing, be and the same are, hereby overruled.

IT IS FURTHER ORDERED, that with the reduction hereinbefore ordered, the judgment for the remaining balance of $57,215.81 together with accrued interest is hereby made final, for which execution may issue if necessary.

To the action of the Court in overruling all of the remaining grounds of its Motion for Rehearing except those above sustained, the defendants respectfully except, pray and are allowed an appeal to the Court of Appeals of Tennessee, Middle Section, upon filing a bond conditioned as required by law; no bill of exceptions being necessary because no evidence has been

received in this cause except as such constitutes part of the technical record or consists of stipulations as herein stated.

/s/ C. ALLEN HIGH
CHANCELLOR

APPROVED FOR ENTRY:

DODSON, HARRIS & ADEN

/s/ TYREE B. HARRIS
Attorneys for Plaintiffs

BRANSTETTER, MOODY & KILGORE

/s/ CECIL D. BRANSTETTER
Attorneys for Defendant

[1]

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

MR. & MRS. GEORGE E. AYERS, et al.,
Plaintiff-Appellees,
VS.
FOREST LAWN MEMORIAL GARDENS, INC., et al.,
Defendants-Appellants,

And DAVIDSON EQUITY

CHARLES D. ALLISON, et ux,
Plaintiffs-Appellees,
VS.
MT. OLIVET CEMETERY COMPANY,
Defendant-Appellant.

(Filed February 24, 1978)

APPEAL FROM CHANCERY COURT, PART II, DAVIDSON COUNTY, TENNESSEE

THE HONORABLE C. ALLEN HIGH, CHANCELLOR

Appeal from Chancery Court

FILED: FEB 24, 1978

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HENRY F. TODD
JUDGE

MODIFIED, AFFIRMED AND REMANDED

[1]

MR. & MRS. GEORGE E. AYERS, et al.,
Plaintiffs-Appellees,

VS.

FOREST LAWN MEMORIAL GARDENS, INC., et al.,
Defendants-Appellants,

And DAVIDSON EQUITY

CHARLES D. ALLISON, et ux,
Plaintiffs-Appellees,

VS.

MT. OLIVET CEMETERY COMPANY,
Defendant-Appellant.

OPINION

In these consolidated cases, the defendants, Forest Lawn Memorial Gardens, Inc., and Mt. Olivet Cemetery Company, have appealed from an unsatisfactory decree. No other defendants were affected by the final decree.

Essentially the cases are class actions to invalidate certain contracts entered into with defendants and to recover refund of the consideration paid to defendants thereunder.

The history of this controversy antedates the filing of these two suits. The opinion of the Supreme Court in *Garrett v. Forest Lawn Memorial Gardens, Inc.*, Tenn. 1974, 505 S.W.2d 705, resulted from a suit by a competitor to enjoin Forest Lawn Memorial Gardens, Inc., from soliciting and entering into contractual arrangements providing for the sale of burial spaces, funeral merchandise and membership in the Forest Lawn Memorial Association. Two patrons of Forest Lawn, Thomas J. and Ruth Lowery, were permitted to intervene to seek return of

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money paid under such a contract and to seek to proceed by class action as representatives of all others similarly situated.

The opinion of the Supreme Court in that case states:

"We have granted certiorari in this case because we think that Sections 56-1101, 56-3201, 56-3205, and 56-3208, T.C.A. should at this time be construed in pari materia and the several cases which have heretofore been before this Court distinguished so as to clarify the distinction which the statutes and cases make between a funeral director or home, on one hand, and associations and similar companies on the other.

. . . .

"T.C.A. Section 56-1101 defines a contract of insurance as:

'. . . an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage to something

in which the other party has an insurable interest . . .'

. . . .

"T.C.A. Section 56-3205 provides, in part, that it shall be unlawful for a company issuing any contract or certificate 'upon the lives of citizens of this state, to designate in said policy contract, or certificate, or otherwise, the person, firm or corporation to conduct the funeral of the insured.'

"The Chancellor was of the opinion that the contract violated the foregoing statutory provisions and we concur in the Chancellor's opinion in this regard, especially where said Section of the Code (56-3205) prohibits a contract which tends to limit or restrict the freedom of choice in the open market regarding contract purchases and arrangements with reference to any part of a funeral service for such insured.

"Again, Section 56-3207 T.C.A., makes it unlawful for a company to enter into a contract with a funeral director, or undertaker, providing that such funeral director or undertaker shall conduct the funeral of persons insured by such insurance company, fraternal benefit society, or similar company.

. . . .

"T.C.A. § 56-3208 provides:

'It shall be unlawful for any *life insurance company, fraternal benefit society, or similar company, or association,*

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engaged in writing any type of life insurance by whatever name called, upon the lives of citizens of this state, to enter into any contract with any citizen of this state, contracting and agreeing to furnish funeral merchandise or services upon the death of any person insured.

'It shall further be unlawful for any *person, firm or corporation* to issue any policy or certificate, or to enter into any contract, conditioned to take effect on the death of any person, wherein such person, or the personal representative, heirs, or next of kin of such person, is promised any rebate, discount or reduction in price for or on account of funeral merchandise, expenses or services by virtue of his being issued such policy or certificate, or being designated as beneficiary therein, or by virtue of his entering into such contract or being designated therein as the recipient of any such rebate, discount or reduction in price. (emphasis added).'

. . . .

". . . A review of the cases cited herein makes it clear that any plan or design employed for the purpose of controlling the funeral business by insurance contracts, will be stricken down by the courts.

"For the reasons herein stated the judgment of the Court of Appeals is affirmed."

505 S.W.2d, pp. 706, 707, 708, 710

The opinion of the Supreme Court does not specify the particulars of the decree which was affirmed. How-

ever, the opinion of this Court in the same case states that the Chancellor declined to sustain the Lowerys' suit as a class action, granted a judgment to the Lowerys for the money they had paid Forest Lawn and issued an injunction as prayed for. This, then, is the action of the Chancellor which was affirmed by this Court and the Supreme Court in *Garrett v. Forest Lawn*.

In the present cases, the plaintiffs sued as holders of contracts substantially identical to that involved in *Garrett v. Forest Lawn* and sought on behalf of themselves and all other members of the class a decree invalidating the contracts and ordering appropriate refund.

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On August 11, 1974, the Chancellor entered an order in the Ayers case reciting:

"This cause came on to be heard upon the entire record and particularly upon the motion of the Plaintiffs to sustain this cause as a class action, to define the class or classes and to direct the parties as to notice and argument of counsel, from all of which it appeared to the Court that the Motion is proper and should be sustained and that the action should be sustained as a class action, the class defined and directions given to the parties as to notice.

"It is, therefore, ORDERED, ADJUDGED AND DECREED that this suit be and the same is hereby sustained as a class action. It is further ORDERED that the class is presently defined subject to later amendments or additions as being 'holders of contracts with Forest Lawn Memorial Gardens or Forest Lawn Memorial Membership Association, a division of Forest Lawn Memorial Gardens, Inc., identical or similar to those filed as exhibits to the original bill by the

terms of which a membership fee is charged such holder and wherein an interment or funeral service is guaranteed such holder for a specific price or sum of money by one of a particular list of mortuaries.' It is further ORDERED that the Defendants will deliver to counsel for Plaintiffs, within thirty (30) days from the entry of this Order, a complete list containing both the names and last known addresses of all parties who now hold or have ever held a contract with the Defendants, or any of them, by the terms of which such contract holder is made a member of any association bearing the name of any of the Defendants hereto and in which such member is afforded an interment or funeral service at a cost not to exceed a fixed amount.

"It is further ORDERED that the Plaintiff shall prepare notices to each of the parties whose names shall be furnished to Plaintiffs as hereinabove ordered enclosing such notice in an addressed envelope with proper postage attached and deliver the same to the Clerk and Master of this Court for mailing by the Clerk and Master, all at the present expense of the Plaintiffs with such expense to be ultimately paid as a part of the costs in this cause. The form of such notice to be agreed upon between the parties and submitted to the Court for approval or in the event of their inability to agree to be fixed by the Court.

"All other matters are reserved."

On August 21, 1974, an identical order was entered in the Allison case.

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On September 25, 1975, plaintiffs in the Allison case filed the following motion:

"Come the plaintiffs and move the Court for a judgment declaring the contracts involved to be invalid based upon the pleadings and for an order of reference to fix the amount of monies owed by the defendant."

The abridged record does not contain a corresponding motion in the Ayers case, but it must be presumed to have been filed in view of the recitations of the next order.

On November 14, 1975, a further order was entered in the Ayers case, as follows:

"This cause came on to be heard upon the entire record, and particularly upon the motion of the plaintiffs for a judgment declaring the contracts involved, to be invalid and for an order of reference to fix the amount owed by the defendants and argument of counsel, from all of which it appeared that the parties agreed that the contracts involved in this litigation were typified by those contracts which were filed as exhibits to the original complaint, and it appearing to the Court that the contracts involved in this litigation were identical or practically identical to the contract which was before the Supreme Court of Tennessee in the case of Claude Garrett and John C. Garrett, Jr., d/b/a Cole and Garrett Funeral Directors v. Forest Lawn Memorial Gardens, Inc. and, therefore, for the reasons set out in the opinion of the Supreme Court in the former case, the ***contracts now before the Court were invalid*** as being in violation of the law of the State of Tennessee, and it further ap-

pearing to the Court that this is a proper case for a reference to determine the remaining members of the class and the amount of refund which said class members have paid on their individual contracts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that *the contracts* issued to the plaintiffs and to all other members of the class represented by the plaintiffs other than those who have exercised their option not to be included within the said class, be and the same *are hereby declared invalid* and unlawful as violative of the laws of the State of Tennessee.

IT IS FURTHER ORDERED, that the plaintiffs and all other members of the class who have not exercised their option to remove themselves therefrom be and they are entitled to a *refund of all monies contracted to be paid* (sic) under such contracts.

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"IT IS FURTHER ORDERED, that this cause be and the same is hereby referred to the Master to answer the following issues upon such proof as may be submitted to them:

1. The names of all the plaintiffs and other members of the class heretofore determined to have not exercised their option to remove themselves therefrom.

2. The amounts of money which each member of the remaining class has contracted to pay to the defendants, or any of them, by virtue of the terms of the contracts hereinabove declared to be invalid.

3. The amounts of money actually paid by each remaining member of the class, the dates the payments

were commenced, and the dates the payments were terminated as to each remaining member of the class.

"All other matters will be reserved pending the incoming of the Master's report.

"*To the action of the Court in finding the contracts filed as exhibits to the complaint to be invalid contracts*, the defendants respectfully except and pray a discretionary appeal to the next term of the Supreme Court sitting at Nashville. And the Court being of the opinion that the determination of the validity of such contracts is a controlling question of law as to which there is substantial ground for difference of opinion, and the Court being further of the opinion that an immediate appeal from such order may materially advance the ultimate determination of this litigation, the Court in the exercise of its discretion grants the discretionary appeal . . . ." (Emphasis supplied)

On the same date, November 14, 1975, the following order was entered in the Allison case:

"This cause came on to be heard upon the entire record and particularly upon the motion of the plaintiffs for a judgment declaring the contracts involved to be invalid and for an order of reference to fix the amount of monies owed and it appearing to the Court that the same issue has today been passed upon by the Court in the case of *Mr. and Mrs. George E. Ayres et al v. Forest Lawn Memorial Gardens, Inc., et al*, to which action the defendants prayed and were granted a discretionary appeal.

"It is, therefore, *by consent of the parties*, ordered that this cause will be taken under advise-

ment and a similar order to that entered in the companion case will be entered in this cause in the event the companion case is not appealled or is affirmed. In the event the said companion case is modified or reversed on appeal, an appropriate order will be entered in the case at Bar following the result reached by the Appellate Court in the companion case. (Emphasis supplied)

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The procedendo of the Supreme Court, entered on May 17, 1976, recited in the printed portion.

". . . the Court is of opinion that in the decree of the Chancellor there is no reversible error."

The opinion filed by the Supreme Court on the same date stated:

"The trial court determined that said contracts between appellee class and Forest Lawn Memorial Gardens, Inc., or division thereof were invalid as alleged. . . .

. . . . . .

"We agree with the trial court and the position of the appellees that the question of the validity of the contracts under consideration herein is controlled by the decision of this Court in the *Garrett* case, *supra*. As insurance contracts employed for the purpose of controlling the funeral business, such contracts are illegal. 505 S.W.2d at 710. We reaffirm our holding in *Garrett* and, therefore, hold that the trial court correctly rescinded the contracts issued by appellants to the members of the class represented

herein *and correctly ordered the refund of all monies paid under such contracts*. (Emphasis supplied)

On June 16, 1976, an order was entered in the Allison case reciting:

"This cause came on to be heard on former days as a consolidated case with the case of *Mr. and Mrs. George E. Ayres et al vs. Forest Lawn Memorial Gardens, Inc. et al*, No. A-3790-A, at which time the Court entered an order in the companion case disposing of the matters then before the Court and in this cause entered an order holding that the matter was taken under advisement pending the final disposition of the companion case on appeal and it now appearing that the cause of *Mr. and Mrs. George E. Ayres et al vs. Forest Lawn Memorial Gardens, Inc. et al* has been in all things affirmed, the parties by agreement now with the Court's approval enter this order.

"IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the contracts issued to the plaintiffs and to all other members of the class represented by the Plaintiffs other than those who have exercised their option not to be included within the said class, be and the same are hereby declared invalid and unlawful as violative of the laws of the State of Tennessee.

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"IT IS FURTHER ORDERED that the plaintiffs and all other members of the class who have not exercised their option to remove themselves therefrom be and they are entitled to a refund of all monies contracted to be paid under such contracts.

"IT IS FURTHER ORDERED that this cause be and the same is hereby referred to the Master to answer the following issues upon such proof as may be submitted to them:

1. The names of all the plaintiffs and other members of the class heretofore determined to have not exercised their option to remove themselves therefrom.

2. The amounts of money which each member of the remaining class has contracted to pay to the defendants, or any of them, by virtue of the terms of the contracts hereinabove declared to be invalid.

3. The amounts of money actually paid by each remaining member of the class, the dates the payments were commenced, and the dates the payments were terminated as to each remaining member of the class.

"All other matters will be reserved pending the incoming of the Master's report."

On October 29, 1976, the following motion was filed in each of these cases:

"Comes the Plaintiffs and move the Court for the entry of a Final Decree in this cause."

On November 11, 1976, an order was entered in the Ayres case containing the following:

"This cause came on to be further heard before the Court by the ***introduction of further evidence and particularly by the submission to the Court of certain records furnished by the defendants*** setting forth the names of the individuals holding contracts with the

defendants who had not opted themselves out of the litigation in question and such records further show the amount of money paid by each of the contract holders with the date of the contract and the date of such contract holders' last payment being further shown and it appearing to the Court that the information contained in the records is accurate and that in view of such information being before the Court, it is no longer necessary to proceed with the reference to the Master heretofore ordered by Decree of this Court entered November 14, 1975, of record in Minute Book 94, Page 681.

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"IT IS THEREFORE, ORDERED that the aforesaid reference be and the same is hereby set aside.

"***Upon the statement of counsel*** of the Defendants that Forest Lawn Memorial Gardens, is, in fact, Forest Lawn Memorial Gardens, Inc. and that Forest Lawn Memorial Membership Association is an operating division of Forest Lawn Memorial Gardens, Inc., the Court so finds as a fact and that, therefore, a judgment is properly rendered against Forest Lawn Memorial Gardens, Inc. only.

"It further appeared to the Court that only three questions remained to be answered, the first being the manner in which the individual contract holders, whose contracts had not been fully paid and whose balance thereon were represented by negotiable instruments held by holders in due course should be protected against further claims thereon.

"It appearing to the Court that the amount owed by each individual contract holder on such contracts is not presently before the Court, but it appearing that the defendant, Forest Lawn Memorial Gardens, Inc., is liable upon all such contracts as endorser. The Court is of opinion that such contract holders would be adequately protected by an Order against the defendant, Forest Lawn Memorial Gardens, Inc., to hold such contract holders harmless thereon.

"The second question presented to the Court was whether or not interest should be awarded to the contract holders on the monies paid by them to the defendant and, if so, the manner in which said interest should be figured. On this issue the Court finds that the said contract holders should be awarded interest at the rate of six (6%) per cent per annum, the Court being of the opinion that interest upon the refunds due the various contract holders should be figured on the total amount of the refund from a date one-half way in point in time between the date of the purchase of the contract and the date of the last payment thereon. The Court is further of the opinion that, in view of the fact that some amount was paid in a lump sum at the time of the purchase of each contract, this formula operates slightly to the disadvantage of the contract holder and that for this reason in the event interest for the entire period upon which interest is figured should result in any fractional interest rate, that the interest rate should be increased to the next full percentage point. The Court finds that under the foregoing formula and as further shown by the records furnished to the Court by the defendant that the defendant is indebted to the contract holders in the

principal amount of $77,079.08, and interest in the amount of $20,022.44, making a total judgment of $97,101.52, which said amount should be paid out in the manner hereinafter directed.

"Finally, the Court was required to pass upon the amount of attorneys' fees which should be paid to the law firm of Dodson, Harris & Aden out of the aforesaid judgment for their services rendered as attorneys for the class which fee the Court fixes at twenty-five (25%) per cent of the total recovery.

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"IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the defendant, Forest Lawn Memorial Gardens, Inc., will protect and hold harmless each of the contract holders whose names are hereinafter set out as being entitled to receive monies from this cause from any and all liability upon any notes or contracts signed by them for the purchase of those contracts declared by this litigation to be illegal.

"It is further ordered that in the event any such contract holder should be required to pay the balance owed on any such contract then and in that event the right is hereby reserved to such contract holder to maintain a separate action against Forest Lawn Memorial Gardens, Inc. for the amount thus paid, together with interest and attorneys fees.

"It is further ordered that a judgment be and the same is hereby entered against the defendant, Forest Lawn Memorial Gardens, Inc., in the amount of $97,101.52.

"It is further ordered that interest on this judgment shall commence as of October 1, 1976 at the rate of eight (8%) percent per annum, which for simplicity's sake, will become due at the rate of one (1%) per cent on each of the following dates: October 2, November 16, January 2, February 16, April 2, May 16, July 2, and August 16.

"It is further ordered that the judgment will be paid out by the Clerk and Master in the following amounts, together with interest accruing from the entry of this Order:

(Here follows a list of contract holders and amounts.)

"It is further ordered that the foregoing judgment represents payments made by the named contract holders through the month of July, 1976, therefore, this Order is entered without prejudice to the rights of any of the above included contract holders to claim repayment by action in law or otherwise for payments made by them on such contracts on and after August 1, 1976." (Emphasis supplied)

On *April 1, 1977*, the Chancellor entered an order (TR 47-51) wherein he overruled Mount Olivet's petition to rehear. Said order recites the following:

This cause came on further to be heard before the Hon. C. Allen High, Chancellor, upon the Motion for Rehearing, upon the entire record in this cause, and upon argument of counsel in open court, *followed by a hearing subsequently held by the Court in Chambers*, following the adjudication of illegality of the contracts and following remand of the companion case,

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Ayers, et al v. Forest Lawn Memorial Gardens Inc., et al., No. A-3790-A, from the Supreme Court of Tennessee; ***that in such hearing or conference, there were presented certain books which had previously been delivered by counsel then representing the defendant*** to counsel for plaintiff; that these books contained loose leaf pages, with one page for each contract-holder held to be a member of the class; that each such page listed the total items purchased under the contract, whether future funeral services, option to purchase a vault upon need, full payment for such vault, a burial lot or lots, memorials, or only one or more of the said items, such information being represented to the Court by defense counsel as having been abstracted from the original records of Mt. Olivet Cemetery Company; and for each such contract, the form showed the date that the contract was entered into, the prices of the various items and any interest charges made, the total contract price, and the date of the last payment made by such contract-holders, which comments showed the actual furnishing of services under those contracts for which some of the services had already been furnished at that time. And the Court holding that the adjudication of illegality of the contracts established generally a duty on the part of the defendant to refund monies received by it, and that such adjudication, taken with the class action adjudication, established a specific duty on the part of the defendant to make refund to all those properly adjudged to be members of the class, and it not being contended except to the extent specifically raised in the Motion for Re-

hearing, that counsel for plaintiff has not properly made computations from such abstracts as to total amount paid by each contract-holder, nor that he improperly computed interest on each contract from the mean date between the date of such contract and the last payment that had been made thereon as of the time of compilation of such abstracts, the Court holds that the listing of individual class members and the amounts due them in the final judgment heretofore entered were and ***constituted a stipulation by plaintiffs' counsel then representing defendants*** that each such figure consisted of total payments made by the contract-holder, plus interest thereon computed from the date at mid-point between the date of the contract and the date of the last payment thereon, less an attorney fee of 25% and less the value of the services, if any, provided by the defendant to the contract-holder; to which holding by the Court the defendant did not object and does not now except. The Court then concluded that the judgment is proper and correct except for the class or who may not properly have been includable therein for their lack of notice.

"The Court further determined and held, in regard to those individuals listed in Paragraph 2 of the defendant's Motion for a New Trial, whose notices mailed by the Clerk and Master had been returned

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undelivered by the Postal Service, that there should be a referral to the Clerk and Master for the purpose of hearing proof and reporting the answer to the question, 'What notice, if any, did those individuals whose names appear in Paragraph 2 of the defendant's Motion

for a Rehearing receive concerning pendency of this cause?' Thereupon, in an effort to avoid the necessity of such a reference, the parties stipulated and do now stipulate to the following facts:

> That approximately simultaneously with the mailing of class-action notices by the Clerk and Master, the defendant mailed envelopes to each of the individuals to whom the Clerk and Master addressed the class-action notices, such envelopes containing a form letter from the defendant, a form letter from the attorney then representing the defendant, and a suggested form for use by the addressee in requesting exclusion from the class, but not containing a copy of the Clerk and Master's notice; and that, although many of the envelopes mailed by defendant to the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were returned, none of the envelopes mailed by defendant to the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were returned to defendant by the U. S. Postal Service. Whereupon, the Court held that the individuals listed in Paragraph 2 of the defendant's Motion for Rehearing were properly included in the class. It is further stipulated that the defendant did not mail notices to any contract-holders as authorized by the Court's decree of December 20, 1976."

The record does not contain a corresponding order in the Allison case, however it must be presumed that such an order was entered, for the record does contain a "Motion for Reharing" (sic) reciting certain alleged

errors in the "final judgment," and certain errors are assigned in this Court as to said final judgment.

The defendants in each case have appealed from the final judgment therein and have filed separate assignments of error.

There is no bill of exceptions.

The record is composed of one abridged technical record in the Ayers case, one abridged technical record in the

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Allison case and one "Supplemental Technical Record," containing selected documents.

This Court will deal with the issues as best it can under the obvious difficulties presented by an incomplete record.

The reply brief of Ayers does not contain an answer to each assignment of error as required by the Rules of this Court, hence this Court is left largely to its own devices in responding to the assignments of error.

The first Forest Lawn assignment is as follows:

> "The learned Chancellor erred in rendering judgment against appellant without any evidentiary trial to determine factual disputes. (Tr. 5-11, 26-27)."

"Tr 5-11" includes various documents exhibited to the complaint. "Tr 26-27" includes parts of the order of November 14, 1975, quoted supra, the relevance of which to this assignment do not readily appear.

Forest Lawn argues:

> "Such decision was erroneous because it imposed liability without the establishment of facts, contrary to statutory and common law and to Tennessee and federal constitutional requirements.
>
> "Such decision was prejudicial to appellant in denying appellant the right to explore obvious contract issues as to the legality and severability of portions of the contract and denied it the right to defensively establish that class members' decision not to exclude themselves from the class did

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> not necessarily indicate any desire to receive a refund instead of demanding performance of the illegal portions of the contract.
>
> "Such decision was prejudicial to appellant because it imposed tremendous liability upon appellant being able to litigate with the actual parties in interest and without requiring proof as the basis of imposition of liability or even affording appellant a pre-judgment opportunity to offer rebuttal evidence."

This assignment is obviously an attack upon a decision of the Chancellor which has heretofore been affirmed by the Supreme Court and must therefore be considered by this Court to be the "law of the case." See authorities annotated in 2A Tenn. Dig., Appeal and Error, § 1195, 655 ff.

This assignment also attacks the final judgment of being without foundation of an evidentiary hearing, when the judgment, quoted supra, specifically states that evi-

dence was received as a basis for the judgment. Without a bill of exceptions, this Court must presume that sufficient evidence was heard to justify the action taken. *Cooper v. Rosson*, Tenn. 1974, 509 S.W.2d 836.

The first assignment of error is respectfully overruled.

The second assignment of Forest Lawn is as follows:

"The learned Chancellor erred in granting a class action monetary judgment against defendant and particularly as to class plaintiffs who received no *official* notice, instead of merely a declaratory judgment as to the illegality of portions of the contract or an injunction mandating refund upon demand of each class member. (Tr. 5-11, S.Tr. 2-3, 23-24)."

Forest Lawn argues:

"Such judgment was erroneous because (i) the Court made no findings as to which type of class

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action it was sustaining, (ii) the allegations of the complaint that disposition of the individual plaintiffs' actions would as a practical matter be dispositive of the claims of the class plaintiffs (if such be the basis for the Court's class action determination), is insupportable, and (iii) the only other basis for class jurisdiction alleged in the complaint is one which is specifically made the basis only for declaratory judgment or injunctive relief. Further, the Court's designation of the mode of notice and the content of such notice, in the absence of positive statutory or rule requirement authorizing such informal notice was constitutionally

inadequate, under the Due Process Clause of the Fourteenth Amendment, to bring the class plaintiffs and their personal rights within the Court's jurisdiction.

"Such decision was prejudicial to appellant in its imposition of tremendous monetary liability upon it while still leaving it under a moral obligation to furnish funeral services and property to class members at the time of bereavement."

Absent evidence to the contrary in the record, it must be presumed that the orders of the Chancellor, quoted supra, were followed as to notice, that is, that notice was mailed to contract holders at their last known address.

Rule 23.03 (2) Rules of Civil Procedure reads as follows:

"(2) In any class action maintained under 23.02(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including publication when appropriate or individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance."

The writer of this opinion is not in accord with the philosophy that the sacred rights of individuals may be so lightly dealt with by the courts under the guise of "consumerism" or "efficiency of procedure." Neverthe-

less, the law as expressed by the above Rule, approved by our General Assembly, must be accepted as controlling in applicable cases.

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The method of notice was in conformity with the quoted rule, and was not error. This is especially true, since the names of contract holders were excluded from the judgment if the notice to them was returned undelivered.

As above quoted, Forest Lawn makes the point that the judgment of the Chancellor required refund of consideration without relieving the defendant of further performance. The invalidation of a contract and refund of consideration by order of Court ipso factor terminates all obligations under the contract. Contract holders should be fully notified of the termination of their rights by the refund, and such notice should be prominently placed on checks sent to contract holders.

Forest Lawn's second assignment of error is respectfully overruled.

The third assignment of error by Forest Lawn is as follows:

> "The learned Chancellor erred in decreeing cancellation of the entire contract of each plaintiff and class plaintiff. (S.Tr. 25-27, Tr. 5-11, 15-16, 26-30)."

Forest Lawn argues:

> "Such decision was erroneous as to class plaintiffs in the absence of any evidence or determination that they had exercised their substantive legal rights to

> determine whether they desire refund from appellant or whether they desired to compel appellant's performance, and is erroneous as to all plaintiffs because the interest charges within each contract were mathematically applicable to each separate charge, the contractual agreements to sell cemetery lots and bronze memorials were lawful and such lawful portions of the contract were severable from the illegal portions."

It is insisted, correctly, that, where a contract contains both legal and illegal clauses, the legal clauses may

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sometimes be severed and preserved while the illegal clauses are invalidated. Such is not the case in the present controversy wherein the illegality is the joining of the clauses, thus invalidating the contract which joined them.

Moreover, as previously stated, this question has already been decided by the Supreme Court whose decision is not subject to review by this Court. For this reason this Court does not consider that it would be proper for it to entertain appellant's insistence that the Supreme Court overlooked T.C.A. §62-528 in its former decision in this case.

The third assignment of error of Forest Lawn is respectfully overruled.

The fourth, and last, assignment of error by Forest Lawn is as follows:

> "The learned Chancellor erred in substantive rulings imposing pre-judgment and post-judgment interest. (Tr. 6, 7)."

With all deference and respect to the laudable desire of the Chancellor to simplify the computation of interest, this Court agrees with the contention that the allowance of interest should be in general terms and computation of same should be left to the Clerk and Master. The ready availability of computers will simplify the otherwise laborious task of determining the amount of interest due in each case.

Appellant first insists that pre-judgment interest should not begin until the actual disaffirmance of each contract by the holder thereof. Such might be true if the contracts were only *voidable*, but they have been held to be *void*. No rights can

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accrue to either party under a void contract which is considered void ab initio, without any legal existence, ever.

This Court approves of the allowance of six per cent interest on each payment of consideration from the date thereof to the date of judgment. The decree of the Chancellor will be modified accordingly.

As to post-judgment interest, it is insisted that same is limited to six per cent by T.C.A. §27-319, as follows:

> "*27-319. Interest on affirmance of decree.* — On affirmance of decrees in equity cases for money, interest shall be recovered at the rate of six per cent (6%) per annum. [Code 1858, §3165; Shan., §4900; Code 1932, §9049.]"

However T.C.A. §47-14-101 provides as follows:

> "*47-14-101. Computation of judgments — Executions issued accordingly — Interest.* — All verdicts

> and judgments in courts of record, and by justices of the peace, shall be rendered in dollars and cents, or such parts thereof as the nature of the case may require; and all executions thereon, and all bills of costs, shall be issued accordingly. Interest on all judgments shall be computed at the rate of eight per cent (8%) per annum. Nothing herein shall apply to judgments relative to state condemnation proceedings. [Code 1858, § 1942 (deriv. Acts 1798-1799, ch. 19, §1); Shan., §3491; mod. Code 1932, §7299; T.C.A. (orig. ed.), §47-1601; Acts 1976 (Adj. S.), ch. 737, §1.]"

The latter statute, re-enacted in 1976, is deemed to have superseded the former statute, so that the statutory rate of interest on all judgments in all courts of record and justice of the peace (General Sessions) courts is eight per cent.

Accordingly, interest at the rate of eight per cent per annum will be computed upon each judgment from date of entry to date of payment.

Except as indicated, the fourth, and last, assignment of error by Forest Lawn is respectfully overruled.

[19]

In the Allison case, the defendant, Mount Olivet, has filed five assignments of error, of which the first four are identical with the first four of Forest Lawn. The discussion and disposition of these assignments will likewise be identical with that heretofore applicable to Forest Lawn's first four assignments.

Mt. Olivet's fifth assignment of errors is as follows:

"The learned Chancellor erred in failing to sustain that part of appellant's motion for a rehearing which asserted that appellant's trial counsel lacked authority to consent to judgment against appellant. (Tr. Par. 6(B), p. 27, pp. 47-50)."

Appellant relies upon *Kelly v. Walker*, 208 Tenn. 388, 346 S.W.2d 253 (1961); however, in that case the consent decree was entered without a hearing, and petition to set same aside was filed within 30 days while the decree was still "within the breast of the court." The circumstances of the present case are entirely otherwise. Counsel for Mt. Olivet was the same as counsel for Forest Lawn, and the purpose of the consent decree was to save expense of transmitting two records to the Supreme Court. In the view of this Court, Mt. Olivet had equal opportunity to participate in the appeal which, by consent of the parties, concluded the issues as to Mt. Olivet as well as Forest Lawn.

Mt. Olivet's fifth assignment of error is respectfully overruled.

Mt. Olivet insists that it is entitled to an evidentiary hearing based upon the statements in the Chancellor's order of November 14, 1975, quoted supra. However, the brief of Mt. Olivet fails to state any material evidence which might have been adduced.

[20]

First it is insisted that the Chancellor should have considered evidentially the severability of the illegal and legal portions of the contracts. This issue was decided as a matter of law by the Supreme Court upon the interlocutory appeal.

Next, it is insisted that defendant might have proved the delivery of certain goods or services *between the date of hearing and the entry of the order*. It appears that all such deliveries shown at the hearing were allowed as credits. The contracts having already been declared void by the Supreme Court, the Chancellor held that further deliveries were at defendant's peril, and this Court agrees.

Although not specifically assigned as error, Mt. Olivet complains of the award of judgment to certain contract holders who had not received notice, the mailed notice having been returned to the Clerk and Master undelivered. In view of the recitations of the order of April 1, 1977, and the stipulations recited therein, it appears that said contract holders did receive sufficient notice of the proceeding through the letters of defendant.

In the Forest Lawn case, the plaintiffs-appellees have assigned as error the action of the Chancellor in disallowing judgment in favor of seven contract holders whose notices were returned undelivered to the Clerk and Master. In the peculiar circumstances of the case it was clearly within the discretion of the Chancellor to exclude said contract holders, and it was not reversible error for him to do so. To say the least, it would be an exercise in futility to require payment of a judgment when the plaintiff could not be found to receive the proceeds.

In summary, all actions of the Chancellor are affirmed *except*:

[21]

1. The orders and decrees of the Chancellor in both cases are modified to add thereto the requirement that, on all remittances to contract holders,

there shall be a prominent notice that, by decree of court, all rights under contracts with defendants have been terminated and that the remittance is in full settlement of all rights of the contract holder.

2. The orders and decrees of the Chancellor in both cases are modified to provide for the inclusion in each judgment of interest at six per cent per annum from date of each payment by contract holder to date of judgment, and that interest after date of judgment shall be at eight per cent per annum until payment as provided by statute.

In all other respects, the actions of the Chancellor are affirmed. The costs of this appeal are taxed one-half against Forest Lawn and one-half against Mt. Olivet. The causes are remanded for implementation of the decrees as modified.

Modified, Affirmed and Remanded,

/s/ HENRY F. TODD
Henry F. Todd, Judge

SHRIVER, P. J., CONCURS

DROWOTA, J., CONCURS

[1]

IN THE COURT OF APPEALS
FOR THE MIDDLE SECTION OF TENNESSEE
AT NASHVILLE

MR. and MRS. GEORGE E. AYRES ET AL Plaintiffs-Appellees VS. FOREST LAWN MEMORIAL GARDENS, INC. ET AL Defendants-Appellants	)	DAVIDSON EQUITY
AND		
CHARLES D. ALLISON ET UX ET AL Plaintiffs-Appellees VS. MT. OLIVET CEMETERY CO. Defendant-Appellant	)	DAVIDSON EQUITY

OPINION ON PETITION TO REHEAR

(Filed April 18, 1978)

The appellants have filed a respectful petition to rehear upon six grounds.

1. Appellants complain that this Court acted upon an erroneous interpretation of the record to the effect that the Chancellor heard evidence.

There is a presumption that every trial court hears evidence before making a decision unless the record satisfactorily shows otherwise. There are two means of making such a showing, (a) by express recitation in the order of court that it was entered without evidence, or, (b) by a bill of exceptions reciting that no evidence was presented.

[2]

Neither such showing appears in this record.

A mere recitation that a cause was heard in chambers does not negative the reception of evidence. Nor does a recitation in a subsequent order that "no testimony was heard in the case", because *evidence* does not consist solely of testimony.

2. Appellants attempt to re-argue the issue of notice to certain class members whose notices from the Clerk and Master were returned underlined but whose notices from the defendants were not so returned. The Chancellor accepted the latter evidence of notice as sufficient, and this Court agreed.

3. Appellants next argue that class members should not be deprived of contractual rights without express waiver by the member. This Court expressed concern with regard to this question but declined to rule that waiver may not be implied by failure to withdraw from the class. That is, this Court reluctantly approved the proposition that failure to withdraw after notice is itself a waiver of election and ratification of the election and disposition made by the Court.

4. Appellants next complain that this Court did not require a severance of legal and illegal parts of the con-

tracts in question. Upon the record presented to this Court this Court was and is satisfied to affirm despite the arguments as to severability.

[3]

5. Appellants next complain of the allowance of pre-judgment interest which was fully argued, considered and disposed of by this Court in its previous opinion. The refund became due the moment of payment, because the payment was upon an illegal contract. Defendants should pay interest for the period during which they had possession and use of plaintiff's money.

Appellants also argue that the opinion of the Supreme Court in the case of *Provident Life & Accident Ins. Co. v. Few* (Recommended for Publication, January 9, 1978) limited post-judgment interest to 6%. In said opinion, the Supreme Court reduced pre-judgment interest to 6%, but approved post-judgment interest of 8%.

> "Interest on the judgment remains at 8%. TCA 346-14-101"
>
> (page 6 of slip opinion)

6. Finally, appellants find fault with the opinion of this Court in regard to the inapplicability of *Kelly v. Walker*, 208 Tenn. 388, 346 S.W.2d 253 (1961) and the estoppel of Mt. Olivet to relitigate matters concluded in an appeal in the companion case against Forest Lawn. This Court is satisfied with its conclusions in respect to this issue.

Having written a twenty-one page opinion in response to appellant's sixty-eight page brief, and having attempted to respond herein to the six (actually seven) grounds of appellant's petition to rehear, this

[4]

Court is satisfied that it has given fair and adequate consideration to the various contentions of appellants.

The petition to rehear is respectfully *denied*.

/s/ HENRY F. TODD
Henry F. Todd, Judge

Shriver, P.J. Concurs
Drowota, J. Concurs

[1]

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FOREST LAWN MEMORIAL GARDENS, INC.,	)	
PETITIONER	)	
VS.	)	
MR. AND MRS. GEORGE E. AYERS,	)	
RESPONDENTS	)	
AND	)	DAVIDSON EQUITY
MT. OLIVET CEMETERY COMPANY,	)	
PETITIONER	)	
VS.	)	
CHARLES D. ALLISON, ET UX.,	)	
RESPONDENTS	)	

ORDER

(Filed November 6, 1978)

The petition to rehear this court's denial of petition for certiorari is denied. Costs are to be paid by the petitioners, Forest Lawn Memorial Gardens, Inc., and Mt. Olivet Cemetery Company.

PER CURIAM

[1]

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FOREST LAWN MEMORIAL GARDENS, INC., PETITIONER	
VS.	
MR. & MRS. GEORGE E. AYERS, RESPONDENTS	
AND	) DAVIDSON EQUITY
MT. OLIVET CEMETERY COMPANY, PETITIONER	
VS.	
CHARLES D. ALLISON, ET UX., RESPONDENTS	

ORDER

(Filed September 18, 1978)

The petition for certiorari filed by Forest Lawn Memorial Gardens, Inc., and Mt. Olivet Cemetery Company is denied with concurrence in results only. Costs will be paid by the petitioners.

PER CURIAM

Opinion

[705]

GARRETT v. FOREST LAWN MEMORIAL GARDENS

Cite as 505 S. W. 2d 705

Claude GARRETT and John C. Garrett, Jr., d/b/a Cole and Garrett Funeral Directors, Plaintiffs-Appellees,

v.

FOREST LAWN MEMORIAL GARDENS, INC., Defendant-Appellant.

Supreme Court of Tennessee

Feb. 19, 1974.

The Chancery Court, Davidson County, Ned Lentz, C., found that certain contracts were contracts of insurance, and the Court of Appeals affirmed. On grant of certiorari, the Supreme Court, W. M. Leech, Special Justice, construed various statutes in pari materia and held that although an individual funeral home or director may contract to arrange the burial of any customer on a pre-need basis if it is stipulated in the contract that the representative of the deceased insured may opt for cash payment in the amount of the maximum price named in the settlement of the contract, any plan or design employed for the purpose of controlling the funeral business by insurance contracts will be stricken by the courts.

Affirmed.

1. Insurance 2

Under statute defining contract of insurance, contract with corporation for funeral at fixed price of $455 by paying membership fee of $100 was contract of insurance. T.C.A. §§ 56-1101, 56-3205.

2. Insurance 1

Funeral director or home may contract with individuals for burial merchandise on pre-need basis, subject to statutory limitations, but if the contract is in the form of a life insurance contract, associations such as cemetery association may not so contract. T.C.A. § 56-3208.

3. Insurance 1

Statute prohibiting any person, firm or corporation from issuing any policy or entering into any contract to take effect on death of person whereby such person, personal representative, heirs or next of kin is promised any rebate, discount or reduction in price of funeral merchandise, expenses or services applies to individual funeral homes and directors and precludes them from issuing pre-need discount certificates. T.C.A. § 56-3208.

4. Insurance 1

Although funeral director or home can deal in funeral merchandise on pre-need basis if discount is not involved in issued contract or certificate, an association may not deal in funeral merchandise in form of life insurance contracts whether or not discount is involved. T.C.A. § 56-3208.

5. Insurance 138(3)

Cemetery association which contracted with individuals to provide funeral at fixed price of $455 by paying

membership fee of $100 violated statute making it unlawful for life company, etc., to designate in policy, contract or certificate the person, firm or corporation to conduct the funeral of the insured to so contract as to limit or restrict freedom of choice in regard to contracts, purchases and arrangements with reference to any part of funeral service for the insured. T.C.A. § 56-3205.

6. Insurance 138(3)

Statute making it unlawful for any life company, etc., to designate in policy, contract or certificate any person, firm or corporation to conduct the funeral or to so contract as to limit or restrict freedom of choice regarding contracts, purchases and arrangements with reference to any part of funeral service for the insured applies to associations and similar companies but not individual funeral directors or homes. T.C.A. § 56-3205.

[706]

7. Insurance 138(1)

Any plan or design employed for purpose of controlling funeral business by insurance contracts will be stricken down by the courts. T.C.A. §§ 56-1101, 56-3201, 56-3205 to 56-3211, 56-3207, 56-3208.

Hooker, Keeble, Dodson & Harris, Nashville, for plaintiffs-appellees.

David M. Pack, Atty. Gen., William B. Hubbard, Asst. Atty. Gen., Nashville, for Commissioner of Insurance and Banking.

Snodgrass & Holt, Nashville, for defendant-appellant.

OPINION

W. M. LEECH, Special Justice.

We have granted certiorari in this case because we think that Sections 56-1101, 56-3201, 56-3205, and 56-3208, T.C.A. should at this time be construed in pari materia and the several cases which have heretofore been before this Court distinguished so as to clarify the distinction which the statutes and cases make between a funeral director or home, on one hand, and associations and similar companies on the other.

The Court of Appeals, Middle Section, in an opinion by Presiding Judge Thomas A. Shriver, concisely stated the case and issues involved as follow:

"Plaintiffs, Claude and John C. Garrett, Jr., d/b/a Cole and Garrett Funeral Directors, brought this action pursuant to T.C.A., Sections 56-3206, et seq., to enjoin the defendant, Forest Lawn Memorial Gardens, Inc., from soliciting and entering into contractual arrangements providing for the sale of burial spaces, funeral merchandise and membership in the Forest Lawn Memorial Membership Association. After the filing of said bill, the Commissioner of Insurance and Banking of Tennessee was permitted to intervene on behalf of the plaintiffs and, subsequent to this, Thomas J. and Ruth Lowery were permitted to file their intervening petition seeking a return of installment payments made pursuant to a contract with the defendant. Said intervening petition sought leave to proceed with said cause as a class action on behalf of similar contract holders with defendant.

The Court declined to sustain the intervening petition of the Lowerys as a class action, but sustained same as an individual action on their behalf.

"The case was tried before Chancellor Ned Lentz on June 7, 1972 on oral documentary evidence, and resulted in a decree sustaining plaintiffs' prayer for an injunction and a judgment on behalf of the plaintiffs Lowery for the money they had paid the defendant under their contract."

. . . .

"The original bill avers, and the record shows that the defendant is a corporation organized under the laws of Tennessee and is engaged in the cemetery business, but, as an adjunct thereto, it operates a division known as Forest Lawn Memorial Membership Association, which said division is engaged in the business of entering into contracts with various individuals for the sale of memorial stones or placques, burial vaults and funeral services, and that said Membership Association attempts to and does procure contracts with various residents of Tennessee providing for funeral merchandise and funeral expenses on a pre-need basis. A copy of such contract used by the defendant is attached to and made 'Exhibit A' to the bill.

"It is alleged that said contract is in violation of T.C.A. Sections 56-3205 through 56-3211.

"The record shows that plaintiff, through Forest Lawn Memorial Membership Association, which is designated as

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a division of plaintiff corporation, offers membership to customers who, as members, may purchase burial spaces, funeral merchandise and bronze markers for use in Forest Lawn Memorial Gardens, which is a cemetery owned by the defendant. A membership fee of $100.00 for each person is required as an initial payment, and, as an incident to such membership, a customer is given the right to purchase a funeral service at the time of need at a fixed price of $455.00, which price is available only to members of the Association. The merchandise and service offered as a part of the contract are especially designed for members in said Association. It is also shown that, as a result of such outstanding contracts and the membership program of the defendant, fifty percent of the funeral services conducted at Forest Lawn Memorial Gardens are membership services. The right to purchase a funeral for $455.00 is available at defendant's funeral home, but also may be purchased through Woodlawn Mortuary which has joined in such program."

. . . .

"OUR CONCLUSIONS

"T.C.A. Section 56-1101 defines a contract of insurance as:

> '. . . an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage to something in which the other party has an insurable interest . . .'

"It is shown by the record that one may contract with the defendant for a funeral at a fixed price of $455.00 by paying a membership fee of $100.00.

"It seems clear that such a contract involves a consideration for a service to be performed at a set fee contingent upon one's death, and that under the foregoing statutory definition, this is an insurance contract.

"It appears that the principal reason for the payment of $100.00 for a membership, or $200.00 in case of a man and wife, is that the member is, thereby, promised a funeral at a fixed price of $455.00, but, according to the record, in order to use these services, one must accept same from the defendant or one of its cooperating mortuaries, and, at present, this gives a choice of two funeral directors, to-wit, Mr. W. H. Ligon, or his father, Mr. Raymond Ligon, and if you should choose any other funeral home or funeral director, you lose the value of your membership fee.

"T.C.A. Section 56-3205 provides, in part, that it shall be unlawful for a company issuing any contract or certificate 'upon the lives of citizens of this state, to designate in said policy contract, or certificate, or otherwise, the person, firm or corporation to conduct the funeral of the insured.'

"The Chancellor was of the opinion that the contract violated the foregoing statutory provisions and we concur in the Chancellor's opinion in this regard, especially where said Section of the Code (56-3205) prohibits a contract which tends to limit or restrict

the freedom of choice in the open market regarding contract purchases and arrangements with reference to any part of a funeral service for such insured.

"Again, Section 56-3207 T.C.A., makes it unlawful for a company to enter into a contract with a funeral director, or undertaker, providing that such funeral director or undertaker shall conduct the funeral of persons insured by such insurance company, fraternal benefit society, or similar company.

"The contract in question provides for the furnishing of a casket, a vault, burial clothes, and burial services, which, it is insisted by appellees, violates T.C.A. Section 56-3208 wherein 'Contracting and agreeing to furnish merchandise or services upon the death of a person in-

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sured,' is prohibited. Said Section also forbids the making of a contract under which there is promised any rebate, discount, or reduction in price for or on account of funeral merchandise, expenses, or services by virtue of being issued such a policy or certificate."

[1] We agree with the Chancellor and the Court of Appeals that the contracts involved are contracts of insurance, and we now come to an examination of the statutes.

Section 56-3201 T.C.A. provides as follows:

"It shall be unlawful for any ***person***, ***partnership***, ***corporation***, ***company or any organization of any nature whatsoever***, to execute or issue a contract on the life

of any person residing in this state which provides that the death benefit, upon the insured's death, shall be settled by furnishing the deceased insured with burial or some part of such service, at a price named in said contract exceeding one hundred dollars ($100.00), unless it is also stipulated therein that said death benefit may be paid in cash in a like amount as the maximum price named or expressed for the burial service or benefit in settlement of such contract, at the option of the representative of the deceased insured . . ." (emphasis added.)

[2] It is clear that this section is applicable to a licensed funeral director or home, as well as an association as in the instant case. It is important to note, however, that the statute does not preclude an individual funeral home or director from contracting to arrange the burial of any customer on a pre-need basis if it is stipulated in the contract that the representative of the deceased insured may opt for cash payment in the amount of the maximum price named in settlement of the contract.

T.C.A. § 56-3208 provides:

"It shall be unlawful for any ***life insurance company***, ***fraternal benefit society***, ***or similar company***, ***or association***, engaged in writing any type of life insurance by whatever name called, upon the lives of citizens of this state, to enter into any contract with any citizen of this state, contracting and agreeing to furnish funeral merchandise or services upon the death of any person insured.

"It shall further be unlawful for any ***person***, ***firm or corporation*** to issue any policy or certificate, or to

enter into any contract, conditioned to take effect on the death of any person, wherein such person, or the personal representative, heirs, or next of kin of such person, is promised any rebate, discount or reduction in price for or on account of funeral merchandise, expenses or services by virtue of his being issued such policy or certificate, or being designated as beneficiary therein, or by virtue of his entering into such contract or being designated therein as the recipient of any such rebate, discount or reduction in price. (emphasis added.)"

A close reading of this statute reveals that the first paragraph is not applicable to a funeral home or director contracting with individual customers on a pre-need basis. It is, however, applicable to an association separate from a funeral home as is involved in the case *sub judice*. A proper construction of this part of the statute allows a funeral director or home to contract with individuals for burial merchandise on a pre-need basis subject to the limitations of the second paragraph. It prohibits, however, associations, as the one in the instant case, from doing that very thing which individual funeral homes and directors are allowed to do, if in the form of a life insurance contract.

[3,4] The latter part of the statute is, however, applicable to individual funeral homes and directors. It precludes them from issuing pre-need discount certificates for the reasons expressed in Long v. Mynatt, 207 Tenn. 319, 339 S.W.2d 26. Defendant contends that language in *Mynatt* to the effect that a discount must be in-

[709]

volved before such contracts are insurance contracts takes its association out of the operation of the statute as its contracts involve a fixed price. That reasoning is incorrect because the first paragraph of the statute precludes an association from dealing in funeral merchandise in the form of life insurance contracts whether or not a discount is involved. Properly construed, then, a funeral director or home can deal in funeral merchandise on a pre-need basis if a discount is not involved in an issued contract or certificate.

[5,6] Defendants are also in violation of T.C.A. § 56-3205 which provides as follows:

"It shall be unlawful for any life insurance company, fraternal benefit society, or other similar company, association, or society issuing insurance policies, contracts, or certificates upon the lives of citizens of this state, to designate in said policy contract, or certificate, or otherwise, the person, firm or corporation to conduct the funeral of the insured, or to organize, promote or operate any enterprise or plan, or to enter into any contract with such insured or with any other person, which plan or contract tends to limit or restrict the freedom of choice in the open market of the person or persons having the legal right of such choice regarding contracts, purchases and arrangements with reference to any part of a funeral service for such insured."

That statute again, is applicable to associations and similar companies but not individual funeral directors or homes who may contract within the other statutory limitations on a pre-need basis.

Beginning with State ex rel. v. Mutual Mortuary Association (1933), 166 Tenn. 260, 61 S.W.2d 664, this Court held that certificates of an association inseparably linked with a funeral home guaranteeing a funeral was an insurance contract and quoted from State ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 P. 878, L.R.A. 1915B, 976, as follows:

> "The contract evidenced by the certificate has all of the elements of a life insurance contract. It is an agreement to perform a service which can become obligatory only on the death of the certificate holder."

The *Mutual* case was followed in 1940 by State ex rel. v. Smith Funeral Service, 177 Tenn. 41, 145 S.W.2d 1021, wherein a slightly different plan was employed, and this Court said:

> "We are of the opinion that in their practical operation the certificates issued by the defendant will impose no liability upon the defendant until the death of the certificate holders."

In 1955 the Legislature enacted Chapter 195, Public Acts, captioned; "An Act to regulate burial insurance and to provide penalties for violation thereof." This Act has been codified in the sections of Tennessee Code Annotated heretofore discussed.

Following the enactment of Chapter 195, Public Acts of 1955, the Cosmopolitan Life Insurance Company filed suit in the Chancery Court for Davidson County attacking the constitutionality of the Act. In Cosmopolitan Life Insurance Company v. Northington, 201 Tenn. 541, 300 S.W.2d 911 (1956), the Act was declared constitutional.

This case was followed in 1960 by the case of Long v. Mynatt, supra, wherein this Court said:

> "For all intents and purposes, under the decision in the Smith case, it makes no real difference whether installment payments are made in the contract or whether there is a named beneficiary or whether an obligation rests on the contract holder to avail himself or his rights under the contract or be bound by it.
>
> "The contract is that in the present case the defendant, Mynatt, entered into an
>
> [710]
>
> agreement for a consideration, to furnish merchandise at a discount, ***and also to furnish services in contemplation of death.***" (Emphasis added)

[7] This Court, in the cases above considered, has looked behind the technical aspects of the contracts involved to the realities of the business. We have therefore construed the statutes applicable in pari materia, for the purpose of clarifying what a funeral home or director may or may not do, and what a burial association may or may not do. A review of the cases cited herein makes it clear that any plan or design employed for the purpose of controlling the funeral business by insurance contracts, will be stricken down by the courts.

For the reasons herein stated the judgment of the Court of Appeals is affirmed.

DYER, CHATTIN, McCANLESS and FONES, JJ., concurring.

APPENDIX B

Tennessee Rules of Civil Procedure

RULE 23. CLASS ACTIONS

23.01. Prerequisites to a Class Action

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

23.02. Class Actions Maintainable

An action may be maintainable as a class action if the prerequisites of 23.01 are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

23.03. Determination by Order Whether Class Action to be Maintained; Notice, Judgment; Actions Conducted

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether the action is to be so maintained. An order under this section may be conditional and may be altered or amended before the decision on the merits.

(2) In any class action maintained under 23.02(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including

publication when appropriate or individual notice to all members who can be identifed through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance.

(3) The judgment in an action maintained as a class action under 23.02(1) or 23.02(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under 23.02(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in 23.03(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

23.04. Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such

manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

23.05. Dismissal or Compromise

A class action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

23.06. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share of membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by

the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders, or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

23.07. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in 23.04, and the procedure for dismissal or compromise of the action shall correspond with that provided in 23.05.

Tennessee Statutes

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56-1101. Contract of insurance—Definition—Restrictions and limitations—Assessment of life and casualty insurance unaffected.— A contract of insurance is an agreement by which one party, for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party has an insurable interest; and it shall be unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this state, or with any resident thereof, or for any person, as insurance agent or insurance broker, to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this title; but nothing contained in chapters 1 through 4, 7, and 11 of this title shall affect the rights and powers of corporations engaged in the transaction of life and casualty insurance upon the assessment plan. Provided, however, that agreements made by a religious, charitable, or nonprofit corporation or association to accept donations of whole blood in return for a promise by such organization to furnish to the donor and his or her immediate family, upon the happening of any illness or injury, benefits not exceeding one hundred dollars ($100) in value, payable either in cash or blood, shall not be deemed to be a contract of insurance within the meaning of this title. Provided further, agreements made by colleges or universities operating accredited medical schools, or by hospitals or clinics operated by or affiliated with such college or university under which

the college or university, hospital, or clinic binds itself to indemnify physicians, nurses and other professional employees or faculty of the college or university for the legal liability of the physician, nurse, or other professional health care employee for loss, damage, or expense incident to a claim rising out of the death or injury of any person as the result of negligence or malpractice in rendering professional service by the employee shall not be deemed to be contracts of insurance within the meaning of this title. The college or university making such agreements shall be required to establish and maintain a distinct reserve fund with which basic malpractice coverage will be provided in an amount at least equivalent to the existing basic Joint Underwriting Association aggregate annual level of coverage.

56-3205. Designation of funeral director by insurer.— It shall be unlawful for any life insurance company, fraternal benefit society, or other similar company, association, or society issuing insurance policies, contracts, or certificates upon the lives of citizens of this state, to designate in said policy contract, or certificate, or otherwise, the person, firm or corporation to conduct the funeral of the insured, or to organize, promote or operate any enterprise or plan, or to enter into any contract with such insured or with any other person, which plan or contract tends to limit or restrict the freedom of choice in the open market of the person or persons having the legal right of such choice regarding contracts, purchases and arrangements with reference to any part of a funeral service for such insured.

56-3208. Contracts for funeral merchandise or service. — It shall be unlawful for any life insurance company, fraternal benefit society, or similar company, or association, engaged in writing any type of life insurance by whatever name called, upon the lives of citizens of this state, to enter into any contract with any citizens of this state, contracting and agreeing to furnish funeral merchandise or services upon the death of any person insured.

It shall further be unlawful for any person, firm or corporation to issue any policy or certificate, or to enter into any contract, conditioned to take effect on the death of any person, wherein such person, or the personal representative, heirs or next of kin of such person, is promised any rebate, discount or reduction in price for or on account of funeral merchandise, expenses or services by virtue of his being issued such policy or certificate, or being designated as beneficiary therein, or by virtue of his entering into such contract or being designated therein as the recipient of any such rebate, discount or reduction in price.

56-3202. Enforcement of contract by representatives of insured. — If such a contract is issued in violation of this chapter, it shall be enforceable by the insured's representatives just as though the stipulation required by § 56-3201 was expressed therein.

27-305. Discretion to review interlocutory appeal — Grounds — Orders not appealable — Multiple claims for relief — Petition to rehear or motion for new trial. — The Court of Appeals, or, in matters expressly limited to its review, the Supreme Court, may in its discretion review matters originating under this section. When interlocutory appeal is pursued under this section no stay of lower court proceedings shall ensue unless expressly granted by the chancellor or circuit judge or by the appropriate appellate court. The appropriate appellate court may give precedence to deciding whether it will grant jurisdiction to an interlocutory appeal hereunder and to whether stay of lower court proceedings shall ensue.

The chancellor or circuit judge, whether at law or in equity, may allow an appeal from an interlocutory order which: (1) grants, refuses, continues, modifies, or dissolves injunctions; or (2) grants, continues, or modifies a restraining order, provided such restraining order as originally granted exceeds twenty (20) days in duration, or continuation or modification thereof is such that the total duration exceeds twenty (20) days from and including the original grant; or (3) appoints receivers, or refuses orders to wind up receiverships, or otherwise directs the sale, partition, or other disposal of property.

When the chancellor or circuit judge, whether at law or in equity, in making in a civil action an order not otherwise appealable under this section shall be of the opinion that such order involves (1) the distinct potential for irreparable harm to one of the parties, or (2) a controlling question of law as to which there is substantial ground for difference of opinion, and such chancellor or circuit judge is of the opinion that an immediate appeal from such order may materially advance the ultimate termination of the litigation, he shall so certify in writing and allow an appeal to be pursued.

When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim,

or third party claim, or when multiple parties are involved, the chancellor or circuit judge, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The chancellor or circuit judge, whether at law or in equity, may grant an appeal in connection with a petition to rehear or a motion for a new trial that has been denied or overruled. The appeal from such a decree or order shall include and there shall at the same time be transmitted the entire trial record and the original decree or order up for review and consideration in connection with the appeal.

United States Code

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§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX C

EXCERPTS, PETITIONER FOREST LAWN'S MOTION FOR REHEARING IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

Comes the defendant and moves the Court to grant a rehearing in the above case, moving specifically for amendment of the final judgment in the respects hereinafter set out under Rule 59.03 and, if the same be denied, for relief therefrom to the extent set out below under Rule 60.02:

1. To delete from the list of individuals to whom refunds are required to be made Charles E. (Mrs. Geraldine M.) Burton ($412.13), Jimmy G. & Susie Baker ($987.82), William J. Eldridge ($203.44), James L. Jr. & Mildred Martin ($471.85), Casper E. & Ann Butler ($690.39), Carolyn Edwards ($326.58), John W. & Virginia Lewis ($629.12), James A. & Nedra F. Wilkes ($708.90), Rodney N. & Hassie M. Boyd ($1,058.01), Henry E. & Doris B. Johnson ($1,397.44), Hillard E. & Nancy Brown ($871.47), James C. & Marjorie A. Heath ($947.32), Ada Mosley ($95.00), Everett A. & Katherine Keister ($1,397.25), Joseph J. Heintz, Jr. ($98.96), Georgia W. & Willie M. Harger ($693.26), and the attorney fees previously deducted from the amounts due such individuals ($3,287.14), totaling $13,148.56, for the following reasons:

(A) As established by the records in the Clerk & Master's Office, the class action notices mailed to all

of the above-named individuals were returned undelivered by the postal service so that no advance notice was communicated to them of the warning that they would be bound by the judgment unless they communicated that their desire for exclusion to the Clerk & Master;

(B) The inclusion of those to whom actual notice was not given is, because of the lack of notice, constitutionally inadequate to give this Court jurisdiction over such individuals' rights under the rationale expounded by the United States Supreme Court in ***Eisen v. Carlisle & Jacquelin***, 17 U.S. 156, 172-176, 40 L.Ed.2d. 732, 745-747, and cases therein cited; and

* * *

2. To eliminate from the order all class action relief, except for the declaratory judgment portion declaring the insurance aspects of the contract to be illegal, because:

* * *

(B) Because in fact, as hereinafter shown, there are wide variations in the entitlement of a class member to a refund upon establishment of the initial determination of illegality of the insurance aspect of the contracts;

and that the Court thereupon order the case restored to the docket to await trial or to await the incoming of such motions for summary judgment and supporting affidavits and/or stipulations as the parties may file.

* * *

4. In the event the Court overrule the class action representational objections hereinabove stated, that the Court nevertheless eliminate all portions of the order directing defendant to pay money for the Clerk & Master and substitute therefor:

(A) A simple money judgment to the plaintiffs individually for the monies they paid in, plus pre-judgment interest from the date they filed suit, May 13, 1974, when they made effective demand for refund; and

(B) A simple declaratory judgment that the defendant is obligated to make refund, with pre-judgment interest from November 14, 1975, upon demand each member of the class, subject to defendant's right to deduct for goods and services actually furnished under such individual contracts because:

(i) The class action representational authority created by Rule 23 only extends to furnishing legal representation in litigation, and does not extend to the point of empowering class action lawyers to make decisions for class members as to their substantive legal rights, that is, the decision as to whether a class member prefers to receive a refund or to compel defendant to honor its far more valuable contractual obligation of furnishing goods and services.

* * *

5. To set aside all parts of the order except the grant of relief to the plaintiffs individually due to the fact that, because of the foregoing considerations set out in Paragraph 4, the judgment was improper because it was entered as a matter of law and not upon evidence on trial or

pursuant to a motion for summary judgment. The order of reference of November 14, 1975, did not include a stipulation that the facts required to be determined only factors, and by its reservation of all other questions, the Court left the case open for proof of the extent to which the illegal contracts have been executed by actual furnishing of burial lots, goods, and funeral services in the interment of class members or members of the families of such class members.

6. Without waiving the foregoing, defendant moves the Court, under Rule 60.02, to grant it relief from the said final judgment in the following respects:

(A) By eliminating the monetary judgment portions thereof to the extent sought in the next two preceding paragraphs (in favor of class members) and to order new notices sent to all class members who have not heretofore excluded themselves for the following reasons justifying relief from the operation of the judgment: (i) because the class action notice was misleading, in that it had the capacity to lead an uninformed contracting party to believe that his option was only one of receiving a refund of the monies he had paid or losing such monies, and (ii) because it did not inform the class members that they had the option of enforcing the contract and thereby obtaining a benefit far more valuable than a refund of their payments less attorney fees. This objection could be effectively met by letting only the declaratory judgment portion of the order as to class action members stand as suggested hereinbefore and by directing that for each member requesting refund, the defendants should compute interest, deduct 25% of the total so computed, and transmit the deducted amount to plaintiffs' attorneys.

* * *

7. That the Court eliminate all class action relief because the class action rule, insofar as it purports to impose class action representation upon individuals with similar or identical legal or equitable rights, is unconstitutional as a taking of individual class-members' liberty and property other than by the law of the land, and without due process of law, contrary to Art. I, 38 of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States, thereby compelling defendant to defend claims whose enforcement has not been judicially sought by their owners.

* * *

EXCERPTS, PETITIONER MT. OLIVET'S MOTION FOR REHEARING IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

Comes the defendant and moves the Court to grant a rehearing in the above case, moving specifically for amendment of the final judgment in the respects hereinafter set out under Rule 59.03 and, if the same be denied, for relief therefrom to the extent set out below under Rule 60.02:

* * *

2. To delete from the list of individuals to whom refunds are required to be made Thomas M. & Katie M. Keel ($949.06), James M. Harris ($214.06), William D. Woods ($106.50), Sylvia Willgus ($114.63), Allie Mae & Percy T. Moore ($532.54), Orville L. & Annie G. Reed ($210.55), Martha Edwards ($103.02), Freeman & Bonnie Harding ($923.74), Estate of William J. McKinley ($105.24), Robert E. & Louise T. Fuqua ($767.95), David F. & Edwina M. Nabors ($892.71), and Curtis G. & Billis H. Drewry ($651.56), and the attorney fees previously deducted from the amounts due such individuals ($1,859.19), totaling $7,428.25, for the following reasons:

(A) As established by the records in the Clerk & Master's Office, the class action notices mailed to all of the above-named individuals were returned undelivered by the postal service so that no advance notice was communicated to them of the warning that they would be bound by the judgment unless they communicated that their desire for exclusion to the Clerk & Master;

(B) The provisions of this Court's Order of December 23, 1974, (Minute Book 91, p. 632), purporting to include such individuals unless the defendant should cause notices to be mailed to them at their correct current addresses and they should then opt out were constitutionally inadequate to give this Court jurisdiction over such individuals' rights under the rationale expounded by the United States Supreme Court in ***Eisen vs. Carlisle & Jacquelin***, 17 U.S. 156, 172-176, 40 L.Ed.2d 732, 745-747, and cases therein cited; and

3. To eliminate from the order all class action relief, except for the declaratory judgment portion declaring the insurance aspects of the contract to be illegal, because:

* * *

(B) Because in fact, as hereinafter shown, there are wide variations in the entitlement of a class member to a refund upon establishment of the initial determination of illegality of the insurance aspects of the contracts;

and that the Court thereupon order the case restored to the docket to await trial or to await the incoming of such motions for summary judgment and supporting affidavits and/or stipulations as the parties may file.

* * *

5. In the event the Court overrule the class action representational objections hereinbefore stated, that the Court nevertheless eliminate all portions of the order directing defendant to pay money to the Clerk & Master and substitute therefor:

(A) A simply money judgment to the plaintiffs individually for the monies they paid in, plus pre-judgment interest from the date they filed suit, May 13, 1974, when they made effective demand for refund; and

(B) A simple declaratory judgment that the defendant is obligated to make refund, with pre-judgment interest from June 16, 1976, upon demand each member of the class, subject to defendant's right to deduct for goods and services actually furnished under such individual contracts because:

(i) The class action representational authority created by Rule 23 only extends to furnishing legal representation in litigation, and does not extend to the point of empowering class action lawyers to make decisions for class members as to their substantive legal rights, that is, the decision as to whether a class member prefers to receive a refund or to compel defendant to honor its far more valuable contractual obligation of furnishing goods and services.

* * *

6. To set aside all parts of the order except the grant of relief to the plaintiffs individually due to the fact that:

(A) Because of the foregoing considerations set out in Paragraph 5, the judgment was improper because it was entered as a matter of law and not upon evidence on trial or pursuant to a motion for summary judgment. The consents recited in this Court's previous orders of November 14, 1975, (Minute Book 94, p. 671), and of June 16, 1976, (Minute Book 97, p. 662), are inadequate basis for such final judgment because the first merely consented to the future entry of an order similar to that entered in the companion *Ayres* case in the event of affirmance, and the second merely consented to the declaration of invalidity of the contracts and the consequent right of class members to a refund, and referred the matter to the Clerk & Master only for the purpose of ascerting two factual matters, the amount contracted to be paid and the amount actually paid by each class member. The order did not include a stipulation that these are the only factors, and by its reservation of all other questions, it left the case open for proof of the extent to which the illegal contracts

have been executed by actual furnishing of burial lots, goods, and funeral services in the interment of class members or members of the families of such class members.

* * *

7. Without waiving the foregoing, defendant moves the Court, under Rule 60.02, to grant it relief from the said final judgment in the following respects:

(A) By eliminating the monetary judgment portions thereof to the extent sought in the next two preceding paragraphs (in favor of class members) and to order new notices sent to all class members who have not heretofore excluded themselves for the following reasons justifying relief from the operation of the judgment: (i) because the class action notice was misleading, in that it had the capacity to lead an uninformed contracting party to believe that his option was only one of receiving a refund of the monies he had paid or losing such monies, and (ii) because it did not inform the class members that they had the option of enforcing the contract and thereby obtaining a benefit far more valuable than a refund of their payments less attorney fees. This objection could be effectively met by letting only the declaratory judgment portion of the order as to class action members stand as suggested hereinbefore and by directing that for each member requesting refund, the defendants should compute interest, deduct 25% of the total so computed, and transmit the deducted amount to plaintiff's attorneys.

* * *

8. That the Court eliminate all class action relief because the class action rule, insofar as it purports to impose class action representation upon individuals with similar or identical legal or equitable rights, is unconstitutional as a taking of individual class-members' liberty and property other than by the law of the land, and without due process of law, contrary to Art. I, 38 of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States, thereby compelling defendant to defend claims whose enforcement has not been judicially sought by their owners.

EXCERPTS, PETITIONER FOREST LAWN'S ASSIGNMENT OF ERRORS AND BRIEF IN THE TENNESSEE COURT OF APPEALS

II

ASSIGNMENT OF ERRORS

Assignment of Error No. 1:

The learned Chancellor erred in rendering judgment against appellant without any evidentiary trial to determine factual disputes. (Tr. 5-11, 26-27).

Such decision was erroneous because it imposed liability without the establishment of facts, contrary to statutory and common law and to Tennessee and federal constitutional requirements.

Such decision was prejudicial to appellant in denying appellant the right to explore obvious contract issues as to the legality and severability of portions of the contract and denied it the right to defensively establish that class members' decision not to exclude themselves from the class did not necessarily indicate any desire to receive a refund instead of demanding performance of the illegal portions of the contract.

Such decision was prejudicial to appellant because it imposed tremendous liability upon appellant without appellant being able to litigate with the actual parties in interest and without requiring proof as the basis of imposition of liability or even affording appellant a pre-judgment opportunity to offer rebuttal evidence.

Assignment of Error No. 2:

The learned Chancellor erred in granting a class action monetary judgment against defendant and particularly as to class plaintiffs who received no *official* notice, instead of merely a declaratory judgment as to the illegality of portions of the contract or an injunction mandating refund upon demand of each class member. (Tr. 5-11, S.Tr. 2-3, 23-24).

Such judgment was erroneous because (i) the Court made no findings as to which type of class action it was sustaining, (ii) the allegations of the complaint that disposition of the individual plaintiffs' actions would as a practical matter be dispositive of the claims of the class plaintiffs (if such be the basis for the Court's class action determination), is insupportable, and (iii) the only other basis for class jurisdiction alleged in the complaint is one which is

specifically made the basis only for declaratory judgment or injunctive relief. Further, the Court's designation of the mode of notice and the content of such notice, in the absence of positive statutory or rule requirement authorizing such informal notice was constitutionally inadequate, under the Due Process Clause of the Fourteenth Amendment, to bring the class plaintiffs and their personal rights within the Court's jurisdiction.

Such decision was prejudicial to appellant in its imposition of tremendous monetary liability upon it while still leaving it under a moral obligation to furnish funeral services and property to class members at the time of bereavement.

* * *

III

BRIEF

* * *

When a state moves to take property, by seizing money or property or by requiring a defendant to spend money for the benefit of others, in administrative or judicial proceedings, the party having the affirmative must prove the existence of every element imposed by the law as a condition to taking the defendant's private property, and such requisite is not a mere rule of evidence but is a procedural requisite of due process of law imposed upon states by the Fourteenth Amendment to the Constitution of the United States.

> *Washington ex rel. Oregon R.R. & Navigation Co. v. Fairchild*, 224 U.S. 510, 530-31, 533, 56 L.Ed. 863 (1912)

* * *

In contrast to the foregoing practical bases of class action litigation, no class action judgment can be entered and made binding upon all members of a class possessing similar or identical *personal* individual legal rights, as distinguished from a common right, merely upon suit of class representatives desirous of enforcing, or nullifying legal instruments given rise to class members' individual rights or liabilities unless there be made parties defendant members of the same "class" who desire the opposite result, and enforcement of a claimed class action judgment in which there is no such defensive class is contrary to the due process requirements of the Fourteenth Amendment to the Constitution of the United States.

> *Hansberry v. Lee*, 311 U.S. 32, 85 L.Ed. 22 (1940)

Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, no class action judgment can validly be entered whose purpose is the enforcement or nullification of individual (as distinguished from group) rights or liabilities of absent class members except upon the service of actual notice adequate to inform each class member to be bound so that he can elect for himself "whether to appear or to default, acquiese or contest . . ."

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)
>
> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40L.Ed.2d 732 (1974)

Even when a court already has within its adjudicative authority a *res* (such as a trust fund) the court cannot adjudicate rights of absent class members which merely relate to the *res* (such as by judgment foreclosing trust beneficiaries from seeking in the future to attack the trustee's past conduct) without having before it, by personal service of adequate notice, adequate defensive class action representatives of the class or classes of people whose rights are to be affected.

> *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1952)

Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a state may not judicially proceed to forfeit a person's individual property rights except upon prior actual service of notice in a manner affirmatively required by law and mere "extra official or casual notice" which merely extends to the citizen the informal privilege of appearing is constitutionally inadequate as a basis for the exercise of such judicial power.

> *Coe v. Armour Fertilizer Works*, 327 U.S. 413, 59 L.Ed. 1027, 1032 (1915)

* * *

EXCERPTS, PETITIONER MT. OLIVET'S ASSIGNMENT OF ERRORS IN THE TENNESSEE COURT OF APPEALS

II

ASSIGNMENT OF ERRORS

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Such decision was erroneous because it imposed liability without the establishment of facts, contrary to statutory and common law and to Tennessee and federal constitutional requirements.

Such decision was prejudicial to appellant in denying appellant the right to explore obvious contract issues as to the legality and severability of portions of the contract and denied it the right to defensively establish that class members' decision not to exclude themselves from the class did not necessarily indicate any desire to receive a refund instead of demanding performance of the illegal portions of the contract.

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Such judgment was erroneous because (i) the Court made no findings as to which type of class action it was sustaining, (ii) the allegations of the complaint that disposition of the individual plaintiffs' actions would as a practical matter be dispositive of the claims of the class plaintiffs (if such be the basis for the Court's class action determination), is insupportable, and (iii) the only other basis for class jurisdiction alleged in the complaint is one which is specifically made the basis only for declaratory judgment or injunctive relief. Further, the Court's designation of the mode of notice and the content of such notice, in the absence of positive statutory or rule requirement authorizing such informal notice was constitutionally inadequate, under the Due Process Clause of the Fourteenth Amendment, to bring the class plaintiffs and their personal rights within the Court's jurisdiction.

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* * *

III

BRIEF

* * *

When a state moves to take property, by seizing money or property or by requiring a defendant to spend money for the benefit of others, in administrative or judicial proceedings, the party having the affirmative must prove the existence of every element imposed by the law as a condition to taking the defendant's private property, and such requisite is not a mere rule of evidence but is a procedural requisite of due process of law imposed upon states by the Fourteenth Amendment to the Constitution of the United States.

> *Washington ex rel. Oregon R.R. & Navigation Co. v. Fairchild*, 224 U.S. 510, 53-31, 533, 56 L.Ed. 863 (1912)

* * *

In contrast to the foregoing practical bases of class action litigation, no class action judgment can be entered and made binding upon all members of a class possessing similar or identical *personal* individual legal rights, as distinguished from a common right, merely upon suit of class representatives desirous of enforcing or nullifying legal instruments given rise to class members' individual rights or liabilities unless there be made parties defendant members of the same "class" who desire the opposite result, and enforcement of a claimed class action judgment in which there is no such defensive class is contrary to the due process requirements of the Fourteenth Amendment to the Constitution of the United States.

Hansberry v. Lee, 311 U.S. 32, 85 L.Ed. 22 (1940)

Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, no class action judgment can validly be entered whose purpose is the enforcement or nullification of individual (as distinguished from group) rights or liabilities of absent class members except upon the service of actual notice adequate to inform each class member to be bound so that he can elect for himself "whether to appear or to default, acquiese or contest . . ."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)

Even when a court already has within its adjudicative authority a *res* (such as a trust fund) the court cannot adjudicate rights of absent class members which merely relate to the *res* (such as by judgment foreclosing trust beneficiaries from seeking in the future to attack the trustee's past conduct) without having before it, by personal service of adequate notice, adequate defensive class action representatives of the class or classes of people whose rights are to be affected.

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1952)

Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a state may not judicially proceed to forfeit a person's individual property rights except upon prior actual service of notice in a manner affirmatively required by law and mere "extra official or casual notice" which merely extends to the citizen the informal privilege of appearing is constitutionally inadequate as a basis for the exercise of such judicial power.

Coe v. Armour Fertilizer Works, 327 U.S. 413, 59 L.Ed. 1027, 1032 (1915)

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1199

FOREST LAWN MEMORIAL GARDENS, INC.,
and MT. OLIVET CEMETERY CO.,
Petitioners,

v.

MR. and MRS. GEORGE E. AYRES, MR. and MRS. RAYMOND C. BROWN, MR. and MRS. WILLIE G. HITT, JR., MR. and MRS. JOSEPH E. JOHNSON, MR. and MRS. ALVIS C. LESLIE, MR. and MRS. JAMES A. RUSSEL, and CHARLES D. ALLISON and wife, IRENE ALLISON,
Respondents.

BRIEF

In Opposition to Writ of Certiorari
To the Court of Appeals of Tennessee, Middle Section

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Respondents.

BRIEF

In Opposition to Writ of Certiorari
To the Court of Appeals of Tennessee, Middle Section

Petitioners assert two questions which they insist afford jurisdiction in this Court to review the action of the Court of Appeals of Tennessee for the denial of due process. Both of these questions are premised upon the assumption that the Tennessee Courts in sustaining these class actions caused members of the class who failed to opt out of the lawsuit to forfeit "valuable contract rights which were legally enforcible." Obviously, the determination of the validity of such contract presents a state question and one which is not reviewable by the federal courts.

"[I]t cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs."

Bell Tel. Co. versus Pennsylvania Pub. Utilities Com., 309 U.S. 30, 32, 84 L.Ed. 563, 564-565, 60 S.Ct. 411.

In the case now before this Court, the Trial Judge held on November 14, 1975, that the contracts in question "be and the same are hereby declared invalid and unlawful as violative of the laws of the State of Tennessee" and further held that the members of the class "who have not exercised their option to remove themselves therefrom be and they are hereby entitled to a refund of all monies contracted to be paid under such contract." (A-5)

This determination by the Trial Court was duly affirmed by the Supreme Court of Tennessee on May 17, 1976, in the following language:

"We agree with the Trial Court and the position of the appellees that the question of the validity of the contract under consideration herein is controlled by the decision of this Court in the *Garrett* case, *supra*. As insurance contracts employed for the purpose of controlling the funeral business, such contracts are illegal. 505 S.W.2d at 710. We affirm our holding in *Garrett* and, therefore, hold that the Trial Court correctly rescinded the contracts issued by appellants to the members of the class represented herein and correctly ordered the refund of all monies paid under such contracts."

(A-9)

Clearly, this is a State question and, the highest court of the State having spoken, its opinion is the final word on the

subject, in each of the questions the petitioners ask this Court to review. Petitioners, in honesty with the Court, found both questions upon the assumption that the members of the class were deprived of due process because they forfeited "valuable contract rights which were legally enforcible" (p-5) and again they forfeited "more valuable contract rights" (p-6). Since the highest court of the State has found "no contract rights" exist by holding "that such contracts are illegal", and "correctly rescinded" the entire basis for petitioners' insistence that there has been a taking of property without due process of law fails; no federal question is presented; and the Petition for Certiorari should be denied.

It is true that petitioners by their argument raise some additional peripheral issues which are not squarely within the question they seek to have answered by this Court. These questions likewise deal with state law without federal constitutional implications.

On page 10 of their petition, petitioners seem to argue that the Trial Court erred in refusing to hold on petition to rehear that portions of the contract were legal and portions were illegal and that the legal portions could be severed from the illegal. This question is interesting only in view of the proper concession that petitioners themselves made in footnote 4 on page 4 of their petition wherein they conceded "the State court rejected such claim and no federal constitutional infirmity was asserted as to such rejection."

On page 11 of their petition, the petitioners allege that the original complaint had averred only a rule 23.02(1) and (2) class action and not a (3) class action and therefore 23.02(3) relief was not warranted. While the complaint is not copied in the petitioners' Appendix for this Court to examine and see what relief was prayed, it is sufficient to respond by saying the State Supreme Court in reviewing the complaint obviously concluded as a matter of state law that the complaint met the test

of rule 23.02(3) as adopted by the Court. In holding that the Trial Court "correctly ordered the refund of all monies paid under such contracts" (A-9) it granted 23.02(3) relief.

Finally, the petitioners attack the language contained in the notice given to the members of the class. Again, it is unfortunate that the notice is not contained in petitioners' Appendix. Actually, the notice in the Forest Lawn case would not be before the Court even if the entire record in the appellate court of Tennessee was certified to this Court. The complaint against the notice in petitioners' brief is "Yet the class action notice gave no indication to the people that they had such valuable enforcement rights even if the contracts were totally legal. . . ." (Petition p. 15) Obviously, if the courts of Tennessee had held that the contracts were totally legal, the respondents' suits would have been dismissed and the "valuable enforcement rights" would have remained invalid.

For all the foregoing reasons, we respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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